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A TREATISE

ON THE

CONTRACTS

OF

COMMON CARRIERS,

WITH SPECIAL REFERENCE TO SUCH AS SEEK TO LIMIT THEIR LIABILITY AT COMMON LAW, BY MEANS OF BILLS OF LADING, EXPRESS RECEIPTS, RAILROAD TICKETS, BAGGAGE CHECKS, ETC., ETC.

BY JOHN D. LAWSON,

EDITOR CENTRAL LAW JOURNAL.

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CENTRAL LAW JOURNAL.

To Hon. U. M. Rose, of Little Rock, Ark., the origin of this work is due. It was his project; which ill health and the demands of an active practice compelled him to relinquish into less competent hands.

The fact that at the present day the transportation either of goods or passengers is seldom undertaken except under a contract exempting the Carrier from a part if not all of his common law liabilities, presents a sufficient reason for the appearance of this book.

The fact that all previous Treatises on the Law of Common Carriers have endeavored to cover the whole field of the duties and responsibilities of the Carrier under all circumstances, and have, therefore, been able to give but small space to the topics of the following pages, removes this Treatise from the criticism that it is upon a subject already well discussed.

It is thought that this work will be of some value to all who have any dealings with the class of which it treats. It presents, besides a statement of the law as it stands, a sketch of the ancient liability of the Common Carrier; the relaxation of those strict rules and the confusion and evil which have resulted therefrom. Whether public policy as a safeguard against corporate monopoly will not soon require a return to the doctrines which the wisdom of our ancestors established, is a question upon which discussion has just commenced, but which has already been answered in the affirmative in more than one of the States. J. D. L.

St. Louis, February 26, 1880.

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Jones v. Pitcher. . . . . 3 St. & P. 135 (1833).	Criticised in this treatise, Cap. VIII. § 165, and see Cap. V. § 125.
Jones v. Voorhees . . . . . 10 Ohio, 145 (1840.)	See Davidson v. Graham, 2 Ohio St. 131 (1853).
Kemp v. Coughtry . . . . 11 Johns. 167 (1814).	See The Waldo, 1 Daveis, 161 (1841).
Kenrig v. Eggleston . . . . . Aleyn, 93.	Doubted in Gibbon v. Paynton, 4 Burr. 2298 (1769).
Kimball v. Rutland &c. R. Co . . . 26 Vt. 247 (1854.)	See Michigan &c. R. Co. v. McDonough, 21 Mich. 165 (1870).
Kirby v. Adams Ex. Co . . . . 2 Mo. (Abb.) 369. 3 Cent. L. J. 435 (1876).	Criticised in this treatise, Cap. IX. § 212.
Kirkland v. Dinsmore . . . . 4 Thomp. & C. 304 (1874.	Overruled in Kirkland v. Dinsmore, 62 N. Y. 171 (1875).
Lake Shore &c. R. Co. v. Perkins . . 25 Mich. 329 (1872.)	Criticised in this treatise, Cap. V. § 109.
Leeson v. Holt . . . . . 1 Stark. 186 (1816).	Overruled in Wright v. Pulham, 2 Chitt. 121 (1816); see Shurld s v Tilson, 2 McLean 458 (1841).
Liver Alkali Co. v. Johnson . . . L. R. 9 Ex. 338 (1874).	Distinguished in Scaife v. Farrant. 23 W. R. 840; 2 Cent. L. J. 605 (1875).
Maghee v. Camden &c. R. Co . . . 45 N. Y. 514 (1871).	Distinguished in Ætna Ins. Co. v. Wheeler, 49 N. Y. 616 (172).
Maving v. Todd . . . . . 1 Stark. 72 (1815).	Denied in Blin v. Mayo, 10 Vt. 56 (1838). Doubted in Story on Bailments, § 451; see Parsons on Contracts 143, note, (5 Ed.)
McClure v. Cox . . . . . 37 Ala. 617 (1858.).	Criticised in this treatise, Cap. VIII. § 165. and see Cap. V. §125.
Merchants Dispatch Trans. Co. v. Moore . . . . . 88 Ill. 136 (1878).	Distinguished in Erie &c. Trans. Co. v. Dater, 8 Cent. L. J. 283 (1879).
Merrick v. Brainard . . . . . 38 Barb. 574 (1860).	Reversed in 34 N. Y. 308 (1866).
Michigan Central R. Co. v. Ward . . 2 Mich. 538 (1853).	Overruled in Michigan Central R. Co. v. Hale, 6 Mich. 242 (1859).
Moore v. Evans . . . . . 24 Barb. 542 (1852).	Denied in Indianapolis &c. R. Co. v. Cox, 29 Ind. 360 (1868).
Morse v. Slue . . . . . Ventris. 238 (1856).	Doubted in Gibbon v. Paynton, 4 Burr. 2298 (1769).
Moses v. Boston &c. R. Co . . . 32 N. H. 523 (1856).	See Wood v. Crocker, 18 Wis. 345 (1864).
Moses v. Norris . . . . . 4 N. H. 304 (1828).	See Hall v. Cheney, 36 N. H. 26 (1857); Hackett v. Boston &c. R. Co., 35 N. H. 390 (1857).
Mosher v. Southern Ex. Co . . . 38 Ga. 37 (1868).	See Nutting v. Conn. Riv. R. Co., 1 Gray 502 (1854; Quimby v. Vanderbilt, 17 N. Y. 306 (1858).
New Jersey Steam Nav. Co. v. Mercht. Bank . . . . . 6 How. 344 (1848).	See Atkins v. Fibre Co., 1 Ben. 118 (1867); The Leonard, 3 Ben. 263 (1869).
New Jersey, The . . . . . Olcott, 444 (1846)	Criticised in this treatise, Cap. VIII. §206.

Nicholas v. New York Cent. R. Co. 6 Thomp. & C. 606. 4 Hun, 327 (1875).	Criticised in this treatise, Cap. II. § 28, VI. § 136.
Nicholson v. Willan. 5 East, 507 (1804).	Doubted in Garnett v. Willan, 5 B. & Ald. 53, 63, (1821).
Oppenheimer v. United States Ex. Co 67 Ill. 62 (1872).	Distinguished in Erie &c. Transportation Co. v. Dater, 8 Cent. L. J. 293 (1879).
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Penn v. Buffalo &c. R. Co 49 N. Y. 204 (1872).	Criticised in this treatise, Cap. V. § 109.
Perkins v. New York Cent. R. 24 N. Y. 196 (1862).	Denied in Hooper v. Wells, 27 Cal. 11, 44 (1864). Criticised in this treatise, Cap. II. § 28, VI. § 128 IX. § 220.
Perry v. Thompson 98 Mass. 249 (1867).	See Grace v. Adams, 100 Mass. 505, (1868).
Poucher v. New York Cent. R. Co 49 N. Y. 263 (1872).	Criticised in this treatise, Cap. VI. § 128.
Pullman Palace Car Co. v. Smith 73 Ill. 360 (1877).	Criticised in this treatise, Cap. I. § 1.
Railroad Co. v. Adams 42 Ill. 474 (1867).	Criticised in this treatise, Cap. VI. § 128.
Railroad Co. v. Allen 31 Ind. 394 (1869).	Criticised in this treatise, Cap. VI. § 128.
Railroad Co. v. Mundy 21 Ind. 48 (1863).	See Michigan &c. R. Co. v. Heaton, 37 Ind. 448 (1871); Ohio &c. R. Co. v. Selby, 47 Ind. 471 (1874). Criticised in this treatise, Cap. IX § 217.
Railroad Co. v. Perkins 25 Mich. 329 (1872).	Criticised in this treatise, Cap. V. § 109.
Railroad Co. v. Remmy 13 Ind. 518 (1859).	Criticised in this treatise, Cap. VI. § 128.
Railroad Co. v. Ward 2 Mich. 538 (1853).	Overruled in Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859).
Rice v. Kansas &c. R. Co. 63 Mo. 314 (1876).	Distinguished in Oxley v. St. Louis &c. R. Co. 65 Mo. 629 (1877).
Rixford v. Smith 52 N. H. 355 (1872).	Criticised in this treatise, Cap. VI. § 137.
Robinson v. Merchants Dis. Trans. Co. 45 Iowa, 470 (1877).	See Southern Ex. Co. v. Armstead, 50 Ala. 350 (1873).
Sampson v. Gazzam 6 Port. 123 (1837).	Criticised in this treatise, Cap. VIII. § 165, and see Cap. V. § 125.
Santee, The 7 Blatchf. 186 (1870).	Distinguished in Collins v. Burns, 36 N. Y. (S. C.) 518 (1873), 63 N. Y. 1 (1875).
Shelton v. Merchants Dispatch Trans. Co. 36 N. Y. (S. C.) 527 (1873).	Overruled in Shelton v. Merchants Dispatch Trans. Co. 59 N. Y. 258 (1874).
Shelton v. Merchants Dispatch Trans. Co. 59 N. Y. 258 (1874).	Distinguished in Wilde v. Merchants Dispatch Trans. Co. 47 Ia. 247 (1877).
Simons v. Great Western R. Co. 18 C. B. 805 (1856).	*Dictum* doubted in Gorton v. Bristol &c. R. Co. 1 B. & S. 112 (1861).
Smith v. New York Cent. R. Co. 24 N. Y. 222 (1862).	Criticised in this treatise, Cap. II. § 28, VI. § 128, IX. 220.

Smyrl v. Niolon . . . . . 2 Bailey, 421 (1831).	Overruled in McClenaghan v. Brock 5 Rich. 17 (1851).
Southern Express Co. v. Armstead . . 50 Ala. 350 (1873).	See Robinson v. Merchants Dispatch Trans. Co. 45 Ia. 470 (1877).
Southern Express Co. v. Caperton . . 44 Ala. 101 (1870).	Criticised in Express v. Caldwell, 21 Wall. 264 (1874); Southern Ex. Co. v. Hunnicutt, 54 Miss. 566 (1877).
Stewart v. London &c. R. Co. . . . 3 H. & C. 135 (1864).	Overruled in Cohen v. Southeastern R. Co. L. R. 2 Ex. D. 253 (1877).
Stiles v. Davis . . . . . 1 Black, 101 (1861).	Criticised in Edwards v. Red Line Transit Co. 104 Mass. 159 (1870).
St. John v. Van Santvoord . . . 25 Wend. 660 (1841).	Overruled in Van Santvoord v. St. John, 6 Hill, 157 (1843).
Sultana, The . . . . . 5 Wis. 454 (1856).	Doubted in Irvine v. The Hamburg, 3 Minn. 192 (1859).
The Casco . . . . . Daveis, 184 (1842).	Criticised in this treatise, Cap. VIII § 206.
The Freedom . . . . . L. R. 3 P. C. 594. 24 L. T. (N. S.) 452 (1871).	Criticised in The Chasca, L. R. 4 Adm. 446; 23 L. T. (N. S.) 838; 44 L. T. Adm. 17 (1875).
The New Jersey . . . . . Olcott 444 (1846).	Criticised in this treatise, Cap. VIII. § 206.
The Pacific . . . . . 1 Blatchf. 569 (1850).	See The General Sheridan, 2 Ben. 294 (1868).
The Santee, ... 7 Blatchf. 186 (1870).	Distinguished in Collins v. Burns, 36 N. Y. (S. C.) 518 (1873); 63 N. Y. 1 (1875).
The Sultana . . . . . 5 Wis. 454 (1856).	Doubted in Irvine v. The Hamburg, 3 Minn. 192 (1859).
Van Horn v. Taylor . . . . . 2 La. Ann. 587 (1847).	Criticised in this treatise, Cap. VIII. § 165.
Van Hern v. Taylor . . . . . 7 Rob. 201 (1844).	Criticised in this treatise, Cap. VIII. § 165.
Walpole v. Bridges . . . . . 5 Blackf. 222 (1839).	Criticised in this treatise, Cap. VIII. § 206.
Warden v. Greer . . . . . 6 Watts. 424 (1837).	Criticised in this treatise, Cap. I. § 14.
Wells v. New York Cent. R. Co. . . 24 N. Y. 181 (1862).	Denied in Hooper v. Wells, 27 Cal. 11, 43 (1864); Mobile &c. R. Co. v. Hopkins, 41 Ala. 486; Rose v. Des Moines Valley R. Co. 39 Ia. 246 (1874). Criticised in this treatise, Cap. II. § 28, VI. § 128.
Wells v. Steam Nav. Co. . . . . 8 N. Y. 375 (1853).	Doubted in Smith v. New York Cent. R. Co. 29 Barb. 132 (1859).
Western Union Tel. Co. v. Carew . . 15 Mich. 525 (1867).	Criticised in this treatise, Cap. I. § 1.
Whitesides v. Thurlkill . . . . 12 S. & M. 599 (1849).	Criticised in this treatise, Cap. VIII. § 165.
Wright v. Gaff . . . . . 5 Ind. 416 (1855).	Criticised in this treatise, Cap. VI. § 128. See Michigan &c. R. Co. v. Heaton, 37 Ind. 448 (1871); Ohio &c. R. Co. v. Selby, 47 Ind. 471 (1874).
Zunz v. Southeastern R. Co. . . . L. R. 4 Q. B. 539 (1869).	Criticised in Henderson v. Stevenson, 2 Sc. & Div. 470 (1875).

THE

CONTRACTS OF COMMON CARRIERS.

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CHAPTER I.

INTRODUCTION — THE LIABILITIES OF COMMON CARRIERS INDEPENDENT OF SPECIAL CONTRACT.

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SECT. 1. *Who are Common Carriers.*— A common carrier is one who undertakes, for hire, to transport the goods for such as choose to employ him, from place to place.[1] His duties partake of a public character, and are subject to legislative regulation and control.[2] Like other bailees for hire, he is bound to the exercise of that care and diligence which are usually bestowed by men of ordinary prudence in the management of their own affairs; and he is liable for any want of skill in his calling. In these respects the common carrier differs not from other bailees for hire.[3]

As coming within the definition first stated, the following are held to the responsibility of common carriers: An express company that forwards goods from place to place, for hire, but in conveyances owned and managed by others;[4] a stage coach proprietor as to the baggage of passengers;[5] a city expressman;[6] an omnibus line;[7] a railroad company,[8] and under some circumstances a horse

[1] Parker, C. J., in Dwight v. Brewster, 1 Pick. 50 (1822); Mr. Justice Clifford in The Niagara v. Cordes, 21 How. 7 (1858).

[2] Peik v. Chicago, &c. R. Co., 94 U. S. 164 (1876); Chicago, &c. R. Co. v. Ackley, 94 U. S. 179 (1876); Winona, &c. R. Co. v. Blake, 94 U. S. 180 (1876).

[3] Angell on Carriers, § 67; Browne on Carriers, § 12.

[4] Christenson v. American Express Co., 15 Minn. 270 (1870); Lowell Wire Fence Co. v. Sargent, 8 Allen, 189 (1864); Sherman v. Wells, 28 Barb. 403 (1858); Baldwin v. American Express Co., 23 Ill. 197 (1859); Read v. Spaulding, 5 Bosw. 395 (1859); Haslam v. Adams Express Co., 6 Bosw. 235 (1860); Sweet v. Barney, 23 N. Y. 335 (1861); Verner v. Sweitzer, 32 Pa. St. 208 (1858); Southern Express Co. v. Newby, 36 Ga. 635 (1867).

[5] Hollister v. Nowlen, 19 Wend. 234 (1838); Cole v. Goodwin, Id. 251 (1838); Clark v. Faxton, 26 Wend. 153 (1839); Powell v. Myers, 26 Wend. 591 (1841); Camden &c. Transp. Co. v. Belknap, 21 Wend. 354 (1839); Jones v. Voorhees, 10 Ohio, 145 (1840).

[6] Richards v. Westcott, 2 Bosw. 589 (1858).

[7] Parmelee v. McNulty, 19 Ill. 556 (1858); Parmelee v. Lowitz, 74 Ill 116 (1874); Dibble v. Brown, 12 Ga. 217 (1852).

[8] Southwestern R. Co. v. Webb, 48 Ala. 585 (1872). Story on Bailments, § 496.

railroad company.[9] Wagoners and teamsters who carry goods for hire from one part of a town to another, or between different towns, are common carriers.[10] So are the owners and masters of steamboats engaged in the transportation of goods for persons generally, for hire. So are lightmen, hoymen, barge owners, ferry-men, canal boatmen, and others employed in like manner.[11] But according to the weight of authority, the owners of steamboats employed in the business of towing are not common carriers.[12]

It has been ruled in two cases that a sleeping car company is not within the definition of a common carrier, nor subject to its responsibilities,[13] but the decisions fail to contain any satisfactory reasons for the distinction. It is likewise a disputed question whether or not a telegraph company is a common carrier, the weight of authority, in this country at least, answering it in the negative.[14] The method by which these conclusions are reached is singular; consisting simply in an attempt to make these modern in-

[9] Levi v. Lynn, &c. Horse R. Co., 11 Allen, 300 (1865.)

[10] Gordon v. Hutchinson, 1 W. & S. 285 (1841); Story on Bailments, § 496.

[11] Story on Bailments, § 496.

[12] The Supreme Courts of Louisiana and North Carolina have decided that they are. Smith v. Pierce, 1 La. 349 (1830); Adams v. New Orleans Towboat Co., 11 La. 46 (1837); Walston v. Myers, 5 Jones, 174 (1857). The Supreme Courts of California and New Jersey, while deciding the cases before them on other grounds, and waiving this question as unnecessary to the decision of the cases, have intimated similar views. White v. The Mary Ann, 6 Cal. 462 (1856); Ashmore v. Penn. Steam Tow Co., 28 N. J. (Law) 180 (1860). The Supreme Courts of New York, Kentucky and Pennsylvania hold the opposite doctrine. Caton v. Rumney, 13 Wend. 387 (1835); Alexander v. Greene, 3 Hill, 9 (1842); Wells v. Steam Nav. Co., 2 N. Y. 204 (1849); Leonard v. Hendrickson, 18 Pa. St. 40 (1851); Varble v. Bigley, 9 Cent. L. J. 153 (1879).

[13] Pullman Palace Car Co. v. Smith, 73 Ill. 360 (1877); Blum v. Southern Pullman Palace Car Co., 3 Cent. L. J. 591 (1876).

[14] In England and California a telegraph company is regarded as a common carrier. McAndrew v. Electric Tel. Co. 17 C. B. 3 (1855); Parks v. Alta California Tel. Co., 13 Cal. 422 (1859). Elsewhere, the doctrine is as stated in the text. Western Union Tel. Co. v. Carew, 15 Mich. 525 (1867); 2 Parsons on Contracts, 251; Redfield on Carriers, § 566; Scott & Jarnigan on Telegraphs.

ventions fit the definitions which Chief Justices HOLT and ELLENBOROUGH gave, and finding them either too wide or too narrow for the purpose to consider them as of another class. It must be conceded that had the palace car and telegraph of this century been as well known to the old common law judges as were the wagoner and messenger of their day, they would scarcely have excluded the first two in establishing a rule for the better protection of the property of the public while intrusted to the hands of others. That the accommodation offered to the passenger was more luxuriant, or that the physical agency employed was a million times swifter in its operation, would have presented a very poor reason for the sleeping car evading the duties of the wagoner, or the telegraph company those of the messenger.

§ 2. *Common Carriers as Insurers.*— In addition to this general liability, the common carrier is regarded as an insurer of the property intrusted to him. His insurance differs from other forms of insurance in the following respects: *First.* When goods in the hands of a carrrier have been lost, he can not sue an insurance company which had insured them for the owner for contribution.[15] In such case the liability of the carrier is primary, and that of the underwriter is only secondary.[16] *Second.* His insurance is always connected with the custody of the goods.[17] *Third.* In the absence of contract, the immemorial common law of England makes certain exceptions from the risks assumed by the carrier, which are not implied in other forms of insurance. *Fourth.* The insurance of the carrier results from the law applied to a particular relationship, and not from a special contract to insure.

§ 3. *Exceptions to the Liability as Insurers.*—Generally, the common carrier is liable for losses proceeding from causes which are wholly beyond his control, and which he

[15] Gailes v. Hailman, 11 Pa. St. 515 (1849).

[16] Hall v. Railroad Co., 13 Wall. 367 (1871); Hart v. Western R. Co., 13 Metc. 99 (1847).

[17] Gailes v. Hailman, *supra*.

could neither provide against nor foresee. But he is not liable for any loss or damage to goods in his hands caused wholly either by the act of God or the "king's enemies," that is, the public enemy. It is said that the reason for these exceptions is that the causes of loss thus excepted are so notorious that they are easily proved or disproved.[18] Other causes of loss might, however, be equally notorious; and other reasons for the exceptions might be suggested. The difficulty of compensating the tremendous losses growing out of public war is sufficiently obvious; and it is known that, in an earlier age, losses caused by lightning, tempest, earthquake, or any other of the more appalling phenomena of Nature, were regarded as the judgments of Heaven, which should be allowed to rest where they fell.[19] At the present time the action of the Deity is as much recognized in the most quiet operation of nature as in the most violent; but it is important to be remembered that in the law of carriers the phrase "the act of God" remains true to its original meaning.

The maxim that common carriers are liable for all losses excepting those caused by the act of God or by the public enemy is convenient enough for common use; but on a closer examination it will be found to be inaccurate, and, hence, to some extent misleading.[20] More correctly, it may be said that the carrier is not liable: *First*. For losses caused by the act of God. *Second*. Losses caused by the

[18] Lord Holt in Coggs v. Bernard, 2 Ld. Raym. 909 (1703); Best, C. J., in Riley v. Horne, 5 Bing. 217 (1828); Forward v. Pittard, 1 Term Rep. 27 (1785); Thomas v. Boston &c. R. Co., 10 Metc. 472 (1845); Spencer, J., in Roberts v. Turner, 12 Johns. 232 (1815); Hollister v. Nowlen, 19 Wend. 234 (1838); Elkins v. Boston &c. R. Co., 23 N. H., 275 (1851); Moses v. Boston &c. R. Co., 24 N. H. 71 (1851); Rixford v. Smith, 52 N. H. 355 (1872.)

[19] "Let us take the case of the Christian thinker some centuries back. His creed being that the Deity created and ordained all things, neverless, when he burnt his finger, the cause of the burn he attributed to the fire, and not to God; but when the thunder muttered in the sky, he attributed that to no cause but God." Lewes' Hist. Philos., vol. I, p. 123.

[20] See Hall v. Renfro, 3 Metc. (Ky.) 51 (1860).

public enemy. *Third.* Losses caused by the inherent defect, quality, or vice of the thing carried. *Fourth.* Losses caused by the seizure of goods or chattels in his hands, under legal process. *Fifth.* Losses caused by some act or omission of the owner of the goods.

With these exceptions the liability of the carrier is unconditional. To hold otherwise, it is said, would be to afford opportunities for collusion between carriers and robbers or thieves, and to open a way for false pretences on the part of carriers which could not be disproved.[21]

§ 4. *The "Act of God."*—In a late English case Mr. Justice BRETT said: "The definition to be extracted from all the cases is said to be given in a note on *Coggs v. Bernard*, in the American edition (by Mr. Wallace) of Smith's Leading Cases. The best form of the definition seems to us to be that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of Nature as the defendant [carrier] could not by any amount of ability foresee would happen; or, if he could foresee that it would happen, could not by any amount of care and skill resist so as to prevent its effect."[22] This definition is susceptible of being misunderstood. The phrases "any amount of ability," and "any amount of care and diligence," might be supposed to erect a standard so high that few could reach it, and which no one could transcend. It is, perhaps, needless to say that the law does not exact from all men, of any class, qualities which are so rare as to be almost unknown. We have seen that the law requires only reasonable skill and reasonable diligence; but these are rigidly demanded.[23] Of course, the exact measure of the skill and

[21] See cases cited § 7.

[22] Nugent v. Smith, L. R. 1 C. P. Div. 19 (1875); 15 Eng. Rep., Moak's Notes, 203; *s. c.*, 1 C. P. Div. 423.

[23] *Ante*, sec. 1; Edwards on Bail. 454. The definition given by Mr. Wallace is substantially similar to that given by Brett, J. 1 Smith's Ld. Cas. 315. See, also, Klauber v. American Express Co., 21 Wis. 21 (1866); Friend v. Woods, 6 Gratt. 189 (1849).

diligence required can be determined only by the degree of the delicacy and importance of the duties assumed in each particular case. With this explanation, the definition thus given may be accepted as being a correct exposition of the law both in England and America.

In order to excuse the carrier, the act of Nature must have been violent; such as lightning,[24] tempest,[25] or earthquake, or an extraordinary flood.[26] The driving of a boat against a bridge-pier by a sudden gust of wind,[27] the freezing of navigable waters,[28] a snow-storm which blocks up a railway,[29] have all been regarded as cases falling within this exception.

§ 5. *Discordant Decisions.*—Sir William Jones piously objected to the use of the phrase "the act of God," as being irreverent, and proposed to put that of "inevitable accident" in its stead, intending, apparently, to give the same restricted meaning to the latter phrase as had been given to the former.[30] Some of the courts have been misled by this suggestion; and have supposed that a common carrier is not liable for any loss which he could not foresee or prevent, excepting, it would seem, all losses caused directly by human means—as by thieves and robbers.[31] In some of the cases the phrase "the act of God" has been used so vaguely that it is not easy to ascertain that any precise

[24] Forward v. Pittard, 1 Term Rep. 27 (1785).

[25] Gillett v. Ellis, 11 Ill. 579 (1850).

[26] Read v. Spaulding, 5 Bosw. 395 (1859); Nashville &c. R. Co., v. David, 6 Heisk. 261 (1871); Wallace v. Clayton, 42 Ga. 443 (1871); Lovering v. Buck Mountain Coal Co., 54 Pa. St. 291 (1867); Lamont v. Nashville &c. R. Co., 9 Heisk. 58 (1871).

[27] Germania Ins. Co. v. The Lady Pike, 17 Am. Law Rep. 614 (1869).

[28] Parsons v. Hardy, 14 Wend. 215 (1835); Harris v. Rand, 4 N. H. 259 (1827); Wallace v. Vigus, 4 Blackf. 260 (1837); West v. The Berlin, 3 Iowa 532 (1856); The Maggie Hammond, 9 Wall. 435 (1869); Worth v. Edmonds, 52 Barb. 40 (1868).

[29] Ballentine v. North Missouri R. Co., 40 Mo. 491 (1867).

[30] Jones on Bail. 104, 105.

[31] Neal v. Saunderson, 2 S. & M. 572 (1844); Walpole v. Bridges, 5 Blackf. 222 (1839).

meaning was attached to it.[32] Other cases are more explicit, without being more satisfactory. Thus, in Connecticut, it was held that the loss of a vessel by running on a rock not generally known, and not known to the master, was, *prima facie*, a loss by the act of God. The decision was unnecessary, as the bill of lading contained an exception of all losses by "dangers of the sea."[33] But in a later case the same court held that this latter exception did not vary the common-law liability of the carrier.[34] So, it has been held that the sinking of a boat by a snag, without negligence, is within the exception of the act of God.[35] In South Carolina it was held, in an early case, that carriers *by water* were not liable for accidents against which ordinary foresight, care, skill and diligence could not provide.[36] Of this curious case the same court afterwards said that "it was fortunately forgotten in the long sleep of thirty-two years before publication,"[37] during which time it had been unconsciously overruled.[38] In Pennsylvania it was held that any misfortune or accident that could not be averted by the skill and prudence of the carrier was within this exception.[39]

[32] Robertson v. Kennedy, 2 Dana, 430 (1834); Sprowl v. Kellar, 4 Stew. & P. 382 (1833); Fish v. Chapman, 2 Ga. 349 (1847); Lewis v. Ludwick, 6 Coldw. 368 (1869).

[33] Williams v. Grant, 1 Conn. 487 (1816).

[34] Crosby v. Fitch, 12 Conn. 410 (1838). But in Hale v. New Jersey Steam Navigation Co., 15 Conn. 539 (1843), a plain distinction was made between the act of God and inevitable accident.

[35] Faulkner v. Wright, Rice 107 (1838). There is a *dictum* of a similar import in Moses v. Norris, 4 N. H. 304 (1828), but it is overruled by Hall v. Cheney, 36 N. H. 26 (1857), and Hackett v. Boston &c. R. Co., 35 N. H. 390 (1857.)

[36] Everleigh v. Sylvester, 2 Brev. 178 (1807).

[37] McClenaghan v. Brock, 5 Rich. 17 (1851).

[38] Harrington v. Lyles, 2 Nott & M. 88 (1819). Yet its authority was seemingly recognized in Steamboat Co. v. Bason, Harp. 262 (1824). But it was dissented from in Patton v. Magrath, Dudley, 159 (1838), and was distinctly overruled in McClenaghan v. Brock, *supra*, which probably overrules Smyrl v. Niolon, 2 Bailey, 421 (1831).

[39] See a long and loose opinion to this effect, by Lowrie, C. J., in Hays v. Kennedy, 41 Pa. St. 378 (1861).

In Indiana there is an intimation of the same kind.[40] In Delaware it was held that if a vessel strike on a rock not hitherto known, and not laid down on any chart, the master is not liable.[41] In one case the court held that, in order for the act of Nature to fall within the exception of the act of God, it need not be violent—as where a vessel was caused to drift against the shore by a sudden lull in the wind.[42] The court was mislead into using the conceptions and language of theology, in place of those of the law. These discordant decisions have been often criticised and condemned.[43] It may be remarked of them that they are for the most part not recent, and that all of them, with one exception,[44] relate to carriers by water—dimly foreshadowing the statutory relaxations that have been made in favor of that class of carriers in the general interest of commerce, and because goods sent by water are more commonly insured than those sent by land; as carriers of the former class frequently lose all their means for paying for any loss to goods intrusted to them, by the same accident by which that loss occurs.

§ 6. *Cases not Within the "Act of God."*—A loss from fire not caused by lightning,[45] or by the bursting of the boiler of a steamer,[46] or by an unseen obstruction in navi-

[40] Walpole v. Bridges, 5 Blackf. 222 (1839).

[41] Pennewill v. Cullen, 5 Harr. 238 (1849).

[42] Colt v. McMechen, 6 Johns. 160 (1810), *s. c.* 5 Am. Dec. 200.

[43] Per Le Grand, J., in Fergusson v. Brent, 12 Md. 9 (1857); Parsons v. Monteath, 13 Barb. 353 (1851); Central Line v. Lowe, 50 Ga. 509 (1873). Note of Mr. Wallace to Coggs v. Bernard, 1 Smith's Ld. Cas. 315.

[44] Walpole v. Bridges, *supra*.

[45] Thorogood v. Marsh, 1 Gow. N. P. C. 105 (1819); Forward v. Pittard, 1 Term. Rep. 27 (1785); Hyde v. Trent Navigation Co., 5 Term. Rep. 389 (1793); Moore v. Michigan Cent. R. Co., 3 Mich. 23 (1853); Cox. v. Peterson, 30 Ala. 608 (1857); Chevallier v. Straham, 2 Tex. 115 (1847); Miller v. Steam Navigation Co., 10 N. Y. 431 (1853); Parsons v. Monteath, 13 Barb. 353 (1851); Hall v. Cheney, 36 N. H. 26 (1857).

[46] McCall v. Brock, 5 Strobh. 119 (1850); Navigation Co. v. Dwyer, 29 Tex. 376 (1867); Bulkley v. Naumkeag Cotton Co., 24 How. 386 (1860); The Edwin, 1 Sprague, 477 (1859); The Mohawk, 8 Wall. 153 (1868).

gation,[47] or by collision not caused by tempest,[48] or by the burning of a ship by the bursting of a cask of chloride of lime, though such an occurrence had never been previously known,[49] or by the sinking of a vessel by running on a piece of timber not visible in ordinary tides,[50] or by the stranding of a vessel on a newly-formed and previously unknown bar in a river,[51] or by the shifting of a buoy,[52] have all been held as not falling within this exception, though in each case the carrier was without fault.

§ 7. *The Question of Negligence Immaterial.*—The question of negligence is wholly irrelevant; for, if the loss does not fall within an exception recognized by law, the carrier is responsible for it, although he exercised every possible dilligence to prevent it.[53] This is only to say that the carrier is an insurer.

§ 8. *Act of God the Exclusive Cause.*—The loss must be caused directly and exclusively by the act of God, or else the carrier will be liable.[54] If divers causes concur in the

[47] Brousseau v. The Hudson, 11 La. An. 427 (1856).

[48] Plaisted v. Boston Steam Navigation Co., 27 Me. 132 (1847); Mershon v. Hobensack, 22 N. J. (Law) 372 (1850).

[49] Brousseau v. The Hudson, *supra*.

[50] New Brunswick Steam Navigation Co. v. Tiers, 24 N. J. (Law) 697 (1853.)

[51] Friend v. Woods, 6 Gratt. 189 (1849).

[52] Reaves v. Waterman, 2 Spears, 197 (1843), Evans and Wardlaw, JJ., dissenting.

[53] Trent Navigation Co. v. Wood, 4 Dougl. 287, 3 Esp. 131 (1785); Siordet v. Hall, 4 Bing. 607 (1828); Clark v. Barnwell, 12 How. 272 (1851); Ewart v. Street, 2 Bailey, 157 (1831); King v. Shepherd, 3 Story, 349 (1844); Agnew v. The Contra Costa, 27 Cal. 425 (1865); Stephens, &c. Trans. Co. v. Tuckerman, 33 N. J. (Law) 543 (1869); Chevallier v. Straham, 2 Tex. 115 (1847); Albright v. Penn, 14 Tex. 290 (1855); Parsons v. Monteath, 13 Barb. 353 (1851); McHenry v. Railroad Co., 4 Harr. 448 (1846); Hays v. Kennedy, 41 Pa. St. 378 (1861); Merritt v. Earle, 31 Barb, 38 (1859); Merritt v. Earle, 29 N. Y. 115 (1864); Forward v. Pittard, 1 Term Rep. 27 (1785); Mershon v. Hobensack, 22 N. J. (Law) 372 (1850); Backhouse v. Sneed, 1 Murph. 173 (1808); Eagle v. White, 6 Whart. 505 (1841), and cases *passim*.

[54] Sprowl v. Kellar, 4 Stew & P. 382 (1833); Ewart v. Street. 2 Bailey, 157 (1831); King v. Shepherd, 3 Story, 349 (1844); Abb. on Ship. 315.

loss, the act of God being one, but not the immediate or proximate cause, the carrier is not discharged;[55] as, where a vessel grounds in a storm, the officers and crew being misled by the absence of a customary light, and the presence of a misguiding light.[56]

§ 9. *Negligence and Act of God Concurring.*—Where the loss is caused partly by negligence and partly by the act of God, the carrier is liable;[57] as where a master of a vessel fills her boilers overnight to be ready for starting in the morning, and a pipe freezes and bursts in the night, though it was customary to fill the boilers of outgoing vessels overnight;[58] or where he has been guilty of any previous misconduct by which the goods in his charge are exposed to the act of God, and are injured thereby.[59] It is negligence for a ferryman to start across a river when a dangerous wind is blowing,[60] or for a wagoner to start across a stream with an insufficient team;[61] and a loss subsequently occurring by reason of the wind, or the sudden rising of the stream, will not be excused. But where there is a loss by the act of God, the carrier will not be held liable on a showing that there was a defect in his vessel, or

[55] New Brunswick Steamboat Co. v. Tiers, 24 N. J. (Law) 697 (1853).

[56] McArthur v. Sears, 21 Wend. 190 (1839).

[57] Lyon v. Mells, 5 East. 428 (1804); Davis v. Garrett, 6 Bing. 716 (1830); Birkett v. Willan, 2 B. & Ald. 356 (1819); Bodenham v. Bennett, 4 Price 31 (1817); Smith v. Horne, 2 Moore, 18 (1818); Powell v. Layton, 2 Bos. & Pull. (N. R.) 365 (1806); Siordet v. Hall, 4 Bing. 607 (1828); Muddle v. Stride, 9 C. & P. 380 (1840); Lowe v. Booth, 13 Price, 329 (1824); Beckford v. Crutwell, 5 C. & P. 242 (1832); Cailiff v. Danvers, 1 Peake, 155 (1792); Hunter v. Potts, 4 Camp. 203 (1815); Oakley v. Steam Packet Co., 11 Ex. 618 (1856); Laveroni v. Drury, 8 Ex. 166 (1852); Hollingworth v. Brodrick, 7 Ad. & E. 40 (1837); Dibble v. Morgan, 1 Woods, 406 (1873); Elliott v. Rossell, 10 Johns. 1 (1813).

[58] Siordet v. Hall, 4 Bing. 607 (1828).

[59] Hart v. Allen, 2 Watts 115 (1833); Williams v. Grant, 1 Conn. 487 (1816); Morgan v. Dibble, 29 Tex. 107 (1867); Chevallier v. Straham, 2 Tex. 115 (1847); Klauber v. American Express Co., 21 Wis. 21 (1866); Cook v. Gourdin, 2 Nott & M. 19 (1819).

[60] Cook v. Gourdin, *supra*.

[61] Loomis v. Pearson, Harp. 470 (1824).

a want of skill on his part; it must also be made to appear that this defect or want of skill contributed to the loss.[62]

§ 10. *Loss by Act of God after Delay.*—Where there is a loss by the act of God after a negligent delay by the carrier, the cases are not uniform as to the liability of the carrier. Mr. Browne says:[63] "So, if he [the carrier] delays an unreasonably long time on the journey, and it is proved that but for such unreasonable waste of time he would have been able to deposit his goods in safety, it will not be a good defence to an action for the amount of injury done to the goods of an owner, who entrusted them to him to be carried, to say that the injury was caused by a flood, which was the act of God." This doctrine is followed in New York.[64] But it is held by the Supreme Court of the United States, and in Pennsylvania, Massachusetts, and Nebraska, that in such case the negligence of the carrier is not the proximate cause of the loss and that he is not answerable for it.[65]

§ 11. *Loss by Act of God after Deviation.*—Deviation is the voluntary departure from the voyage or route without necessity or reasonable cause.[66] Necessity can alone sanction it in any case, and then it must be strictly commensurate with the *vis major* producing it.[67] If a master deviates from the usual course of his voyage, and damage is caused by a tempest, in itself the act of God, the proximate cause of the loss is the wrongful act of the master,

[62] Hart v. Allen, 2 Watts, 115 (1833), overruling Bell v. Reed, 4 Binn. 127 (1810); New Brunswick Steam Navigation Co. v. Tiers, 24 N. J. (Law) 697 (1853).

[63] Browne on Car. 95.

[64] Read v. Spaulding, 30 N. Y. 630 (1864), dissenting from Morrison v. Davis, 20 Pa. St. 171 (1852).

[65] Morrison v. Davis, *supra*; Railroad Co. v. Reeves, 10 Wall. 176 (1869); Denny v. New York Cent. R. Co., 13 Gray, 481 (1859); Hoadley v. Northern Transportation Co., 115 Mass. 304 (1874); McClary v. Sioux City &c. R. Co., 3 Neb. 44 (1873).

[66] Bond v. The Cora, 2 Pet. Adm. 373 (1807).

[67] Maryland Ins. Co. v. Le Roy, 7 Cranch, 26 (1812).

and he is responsible for it.[68] The same rule applies to carriers by land.[69] If a carrier has agreed to send goods by land, and he sends them by water,[70] or, if he has agreed to carry them by canal, and he takes them out to sea,[71] and they are lost by act of God, he is liable. So, if he agrees to send them by one line of boats and sends them by another.[72] The burden of showing a necessity for a deviation rests upon the carrier;[73] and the necessity must be real, and not merely apparent.[74] If the deviation is only for the convenience of the carrier, he assumes the risk of any loss that may occur, and becomes an insurer at all events.[75] But it is the duty of the carrier, in an unforseen emergency, when the safety of the goods requires it, and when the consent of the owner may fairly be presumed, to deviate from the letter of his instructions, and, if possible, to notify the owner of such deviation.[76] If a carrier has agreed to send goods by a particular line of boats, and the owner of the boats refuses to receive them, the carrier should advise the owner of the goods of that fact, depositing them in a warehouse if need be, and should wait for further instructions.[77] And a carrier is bound to follow the instructions of his employer as to the selection of carriers beyond his own route.[78] It has been said that if a loss occurs after a deviation, and

[68] See opinion of Tindall, C. J., in Davis v. Garrett, 6 Bing. 716 (1830); Ang. on Car., secs. 203–4; Story on Bail., sec. 413.

[69] Powers v. Davenport, 7 Blackf. 496 (1845); Lawrence v. McGregor, Wright, 193 (1833); Phillips v. Brigham, 26 Ga. 617 (1859).

[70] Ingalls v. Brooks, Ed. Sel. Cas. 104 (1845).

[71] Hand v. Baynes, 4 Whart. 204 (1838).

[72] Johnson v. New York Cent R. Co., 33 N. Y. 610 (1865).

[73] Le Sage v. Great Western R. Co., 1 Daly, 306 (1863); Ackley v. Kellogg, 8 Cow. 223 (1828).

[74] Hand v. Baynes, *supra*.

[75] Johnson v. New York Cent. R. Co., 33 N. Y. 610 (1865), reversing *s. c.*, 31 Barb. 196 (1857); Sager v. Portsmouth &c. R. Co., 31 Me. 228 (1850).

[76] *Ibid.*

[77] *Ibid.*; Fisk v. Newton, 1 Denio, 45 (1845); Story on Bail., sec. 543; Goodrich v. Thompson, 44 N. Y. 324 (1871).

[78] Johnson v. New York Cent. R. Co., 33 N. Y. 610 (1865).

the carrier can show that a loss must have certainly occurred had there been no deviation, the carrier shall be excused;[79] but it is difficult to see how such proof would be possible.

§ 12. *Duty of Carrier to Preserve Goods Damaged by Act of God.*—Where the loss sustained by the act of God is not a total one, it is the duty of the carrier to preserve such portions of the goods as may still possess some commercial value.[80] And he must show that he afterwards delivered them to the consignee without any further damage,[81] or that he has used, actively and energetically, such means to save them as prudent and skilful men engaged in his business might fairly be expected to use under like circumstances.[82] Thus, for illustration, if goods are wet during a storm, the carrier must open them and dry them;[83] or if his vessel is wholly disabled, he must use his utmost exertions to transport or send the goods forward to the port of delivery, even though he have to hire another vessel for that purpose.[84] In any event, the carrier will always be answerable for that amount of the damage which is the result of his own want of diligence.[85]

§ 13. *The Public Enemy.*—Common carriers are not responsible for losses caused by the "king's enemies," *i. e.* the public enemy. Public enemies are those with whom the nation or State is at open war, and pirates on the high seas.[86] But a loss by thieves or robbers,[87] or by embezzle-

[79] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871).

[80] Craig v. Childress, Peck, 270 (1823).

[81] Day v. Ridley, 16 Vt. 48 (1844).

[82] Railroad Co. v. Reeves, 10 Wall. 176 (1869); Nashville &c. R. Co. v. David, 6 Heisk. 261 (1871).

[83] Chouteaux v. Leech, 18 Pa. St. 224 (1854).

[84] The Maggie Hammond, 9 Wall. 435 (1869).

[85] Faulkner v. Wright, Rice, 107 (1838).

[86] Chitty on Car., 37, Jeremy on Car., 34; Story on Bail., secs. 512, 526; Ang. on Car., sec. 200; 3 Kent's Com. 216, 299.

[87] Coggs v. Bernard, 2 Ld. Ray. 909 (1703); Ang. on Car., sec. 200; Boon v. The Belfast, 40 Ala. 184 (1866); Hall v. Cheney, 36 N. H. 26 (1857).

ment,[88] or by rioters or insurgents,[89] is not within the exception, unless the insurrection assumes the magnitude of an international war, as was the case in the late civil war in this country.[90] Robbery on a river where the tide ebbs and flows is not a loss from the public enemy, though an act of Congress may have provided that such a robbery shall be deemed piracy.[91] If a loss by a public enemy is incurred through the negligence of the carrier, he will be liable.[92] The "king's enemies" include the enemies of the sovereign of the person executing the bill of lading.[93]

§ 14. *Losses Caused by Inherent Defects in Goods Carried.*—Carriers are not liable for losses arising from the ordinary wear and tear of goods in the course of transportation, nor for their ordinary deterioration in quantity or quality, nor for their inherent natural infirmity or tendency to damage; and this rule includes the decay of fruits, the diminution, leakage, or evaporation of liquids, and the spontaneous combustion of goods. In all such cases, where the negligence of the carrier does not co-operate in the loss, he will be excused.[94] This exception also includes all injuries done by living animals to themselves and to each other; losses that are caused by their inherent vices and

[88] Schieffelin v. Harvey, 6 Johns, 170 (1810); Watkinson v. Laughton, 8 Johns, 213 (1811); Lewis v. Ludwick, 6 Coldw. 386 (1869).

[89] Coggs v. Bernard, *supra;* Forward v. Pittard, 1 Term Rep. 27 (1785).

[90] Hubbard v. Harnden Express Co., 10 R. I., 251 (1872); Smith v. Brazelton, 1 Heisk, 44 (1870); Lewis v. Ludwick, *supra.*

[91] The Belfast v. Boon, 41 Ala. 50 (1867).

[92] Amies v. Stevens, 1 Strange, 128 (1718); Forward v. Pittard, *supra.*

[93] Russell v. Nieman, 17 C. B., N. S. 160 (1864).

[94] Story on Bail., sec. 492 *a;* 3 Kent's Com. 299-301; Hastings v. Pepper, 11 Pick. 41 (1831); Chitty on Car. 44; Browne on Car. 103; Ang. on Car. sec. 211; The Collenberg, 1 Black, 170 (1861). Losses of this kind are sometimes spoken of as being caused by the act of God. Browne on Car. 102; Warden v. Greer, 6 Watts, 424 (1837); but the action of Nature causing the loss is neither sudden, violent, nor irresistible. It does not, therefore, fall within any definition of the act of God. See Hall v. Renfro, 3 Metc. (Ky.) 51 (1860).

propensities,[95] and which excuse the carrier if his negligence does not concur in causing them.[96]

§ 15. *Liabilities of Carriers of Passengers.*—A carrier of passengers for hire is not like a common carrier of goods an insurer against everything but the act of God and the public enemy. He is bound, however, to the use of the utmost care in the providing of safe and sufficient vehicles and means of transportation and in their management.[97]

§ 16. *Liabilities of Carriers of Animals.*—As the transportation of living animals was unknown to the era of the formation of the common law, it has been much debated as to whether persons engaging in this business assume all the liabilities of common carriers or not. Mr. Justice WILLES regarded the question as being probably one of words, it being much the same thing to say that carriers of animals are not common carriers, and to say that they are common carriers, with the modification that they are not liable for any damage or loss growing out of the vices or propensities of the animals carried.[98] The question is, however, very important, since it affects that of the burden of proof; and because it follows that, if such carriers are not common carriers, they are not liable for any damage or loss not occasioned in some way by their own want of skill and care, though such damage or loss may not fall within any of the exceptions made by law to the liabilities of common carriers.

[95] Ang. on Car., sec. 214; Michigan R. Co. v. McDonough, 21 Mich, 165 (1870); Lake Shore R. Co. v. Perkins, 25 Mich. 329 (1872); Kansas Pac. R. Co, v. Reynolds, 8 Kas. 623 (1871); Great Western R. Co. v. Blower, 20 W. R. 776 (1872).

[96] Clarke v. Rochester &c. R. Co., 14 N. Y. 570 (1856); Ohio &c. R. Co. v. Dunbar, 20 Ill. 623 (1858); Smith v. New Haven &c. R. Co., 12 Allen, 531 (1866); Hall v. Renfro, *supra;* Evans v. Fitchburgh R. Co., 111 Mass. 142 (1872); Conger v. Hudson River R. Co., 6 Duer, 375 (1857); Harris v. Northern &c. R. Co., 20 N. Y. 232 (1859); Powell v. Pennsylvania R. Co., 32 Pa. St. 414 (1859); East Tennessee &c. R. Co. v. Whittle, 27 Ga. 535 (1859); Welch v. Pittsburg &c. R. Co., 10 Ohio St. 65 (1859).

[97] Simmons v. New Bedford, &c., R. Co., 97 Mass. 361 (1867); Story on Bailments, sec. 590.

[98] Great Western R. Co. v. Blower, 20 W. R. 776 (1872).

In England, carriers of living animals are not considered as common carriers;[99] and if a horse is injured while it is in transit by rail, and the cause of the injury is unknown, the injury will be presumed to have come about through the proper vice of the animal, it being shown both that it was quiet and accustomed to travel by rail, and that no accident had occurred, nor anything likely to alarm it.[100] In Kentucky the stringency of the common-law rule does not apply to carriers of live stock; they are not insurers. But, in case of injury to such live stock, the legal presumption, *prima facie*, is that it was caused by the negligence of the carrier.[101] In Michigan, carriers of animals are not regarded as common carriers, unless they have expressly assumed the responsibilities of common carriers by special contract.[102] But in most of the States carriers of living animals are held to be common carriers, and to be insurers to the same extent as if engaged in carrying general merchandise, subject to the explanation contained in the preceding sections as to loss or damage caused by the animals to themselves and to each other.[103] Where the animals are

[99] McManus v. Lancashire &c. R. Co., 2 H. & N. 693 (1858); McManus v. Lancashire &c. R. Co., 4 H. & N. 328 (1859); Carr v. Lancashire &c. R. Co., 7 Exch. 712 (1852); Palmer v. Grand Junction R. Co., 4 M. & W. 749 (1839); Pardington v. South Wales R. Co. 38 Eng. Law & Eq. Rep. 432 (1856); Michigan R. Co. v. McDonough, 21 Mich 165 (1870).

[100] Kendall v. London R. Co. L. R. 7 Ex. 373 (1872).

[101] Louisville &c. R. Co. v. Hedger, 9 Bush, 645 (1873); Hall v. Renfro, 3 Metc. (Ky.) 51 (1860).

[102] Lake Shore &c. R. Co. v. Perkins, 25 Mich. 329 (1872), overruling Mich. &c. R. Co. v. Hale, 6 Mich. 243 (1859), and Great Western R. Co. v. Hawkins, 18 Mich. 427 (1869).

[103] Kimball v. Rutland &c. R. Co. 26 Vt. 247 (1854); Agnew v. The Contra Costa, 27 Cal. 425 (1865); Atchison &c. R. Co. v. Washburn, 5 Neb. 117 (1876); Kansas &c. R. Co. v. Reynolds, 8 Kas. 623 (1871); Kansas &c. R. Co. v. Nicholls, 9 Kas. 235 (1872); Ritz v. Pennsylvania R. Co., 3 Phila. 82 (1858); Cragin v. New York &c. R. Co. 51 N. Y. 61 (1872); Penn v. Buffalo &c. R. Co., 49 N. Y. 204 (1872); Mynard v. Syracuse &c. R. Co. 13 Alb. L. J. 431; *s. c.*, 7 Hun, 399 (1876); German v. Chicago &c. R. Co., 38 Iowa, 127 (1874); McCoy v. Keokuk &c. R. Co., 44 Iowa, 424 (1876); Wilson v. Hamilton, 4 Ohio St. 722 (1855); Welsh v. Pittsburg

killed under circumstances exonerating the carrier, he is not liable for not delivering their carcasses.[104]

§ 17. *Losses Caused by Seizure under Process.*— A carrier is not liable for goods taken out of his hands by legal process.[105] Where goods are attached in the hands of a common carrier, he can not give them up to the consignee while the atachment is pending.[106] In such case the carrier is not answerable, even though the goods have been attached for the debt of a third person, and under a proceeding to which the employer of the carrier is not a party. The right of the officer to hold the goods can only be determined by the court having jurisdiction of the attachment suit. The remedy of the bailor, for an illegal seizure of his goods for the debt of another, is not against the carrier, but against the officer making the seizure, or against the plaintiff in the attachment, if he directed the seizure.[107] But,

&c. R. Co., 10 Ohio St. 65 (1859); St. Louis &c. R. Co. v. Dorman, 72 Ill. 504 (1874); South Alabama &c. R. Co. v. Henlein, 52 Ala. 606 (1875); Rixford v. Smith, 52 N. H. 355 (1872); Clarke v. Rochester &c. R. Co. 14 N. Y. 750 (1856); Ohio &c. R. Co. v. Dunbar, 20 Ill. 623 (1858); Smith v. New Haven &c. R. Co., 12 Allen, 531 (1866); Evans v. Fitchburg R. Co., 111 Mass. 142 (1872); Conger v. Hudson River R. Co. 6 Duer, 375 (1857); Harris v. Northern &c. R. Co., 20 N. Y. 232 (1859); Powell v. Pennsylvania R. Co., 32 Pa. St. 414 (1859); East Tennessee &c., R. Co. v. Whittle, 27 Ga. 535 (1859). The carrier is responsible for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of the animals. Clarke v. Rochester &c. R. Co., *supra.*

[104] Lee v. Marsh, 28 How. Pr. 275 (1864).

[105] Stiles v. Davis, 1 Black, 101 (1861); Bliven v. Hudson River R. Co., 36 N. Y. 403 (1867); Bliven v. Hudson River R. Co., 35 Barb. 188 (1861); Van Winkle v. United States Mail Co., 37 Barb. 122 (1862); Burton v. Wilkinson, 18 Vt. 186 (1846); Ohio, &c. R. Co. v. Yohe, 51 Ind. 181 (1875).

[106] Stiles v. Davis, *ubi supra;* Verrall v. Robinson, Tyrw. 1069; *s. c.*, 4 Dowl. P. C. 242; *s. c.*, 2 Cromp. M. &. R. 495 (1835). "It would be absurd for the law to punish a man for not doing — or, in other words to require him to do — that which it forbids his doing." 2 Pars. on Con. 674. "If a coach be damaged by a carrier's fault, whatever is lost he shall be compelled to make good, unless the injury happens by the act of God, *or of the king*, and whatever does not so happen denotes a fault." 2 Colebroke's Dig. Hindu Law, 272.

[107] Stiles v. Davis, *supra.*

when such a seizure is made, the carrier must immediately notify that fact to the consignor.[108] The carrier must assure himself that the proceedings under which the seizure is made are regular and valid; but he is not bound to litigate for his bailor, nor to show that the decision of the court issuing the process is correct in law or fact.[109] And he is not bound to assert the title of the bailor, nor to follow the goods.[110]

§ 18. *Discordant Decisions.*— In a case decided in England at *nisi prius*, by Lord ELLENBOROUGH, in 1808,[111] a vessel had been detained and condemned in Jamaica for a breach of revenue laws; but on appeal the condemnation was reversed. It was held that the master was liable for a loss caused by the delay, the court saying: "You have an action against the officers. The shipper can only look to the owner or master of a ship." This last proposition is clearly wrong. We do not find the case cited in any late English work on Carriers, and it is no doubt regarded as bad law. But in a late case in Massachusetts it was held that, in a suit against a common carrier for non-delivery of goods, it is no defense to say that they were taken from the carrier by an officer under an attachment against any one who was not their owner.[112]

§ 19. *Losses caused by Act or Omission of Owner.*—It is clear that if the owner of the goods should directly do an

[108] Ohio, &c. R. Co. v. Yohe, *supra;* Bliven v. Hudson River R. Co., *supra;* Scrantom v. Farmers' Bank, 24 N. Y. 424(1862).

[109] Bliven v. Hudson River R. Co., 35 Barb. 188 (1861).

[110] Ohio &c. R. Co. v. Yohe, *supra.* Where a vessel was detained by a military officer, it was held that the owner of it was not answerable for a loss by reason of a fall of prices of goods on board during the period of detention, he having yielded only to a force which he could not resist. The Onrust, 1 Ben. 431 (1867).

[111] Gosling v. Higgins, 1 Camp. 451.

[112] Edwards v. White Line Transit Co., 104 Mass. 159 (1870). The court went astray on the irrelevant and abstract question as to whether, when the property of A is attached as the property of B, it is in the custody of the law as to A. The case is remarkable for a very ineffectual criticism on Stiles v. Davis, *supra.*

injury to them while in the hands of the carrier, the latter could not be made answerable for such injury. Such a case is not like to occur; but cases do often occur where the loss or damage to the goods would not have been inflicted if the owner had done everything that he ought to have done. The question in such cases is whether the owner himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened.[113]

§ 20. *Concealment of Value or Quality.*—The carrier has a right to know the value of the goods, so that he may know what risk he takes on himself; what care he should exercise, and what charge he should make. The owner is not bound to state the value unless he is asked to do so,[114] but if he is asked the value, he must answer truly.[115] Neither must the owner mislead the carrier by making him underestimate the value of the goods, even though no questions are asked; as by sending a large sum of money concealed in a bag of hay,[116] or placed in a box with articles of small value,[117] or by sending a diamond ring in a small paper box tied with a string,[118] or by sending valuable jewelry under any circumstances which would naturally lead the carrier to suppose it to be of but trifling value;[119] and if he does thus mislead the carrier, and the goods are afterwards

[113] Railroad Co. v. Jones, 95 U. S. 439; 6 Cent. L. J. 45 (1877).

[114] Brooke v. Pickwick, 4 Bing. 218 (1827); Southern Express Co. v. Crook, 44 Ala. 468 (1870); Gorham Mfg. Co. v. Fargo, 45 How. Pr. 90 (1873); Camden, &c. R. Co. v. Baldauf, 16 Pa. St. 67 (1851); Relf v. Rapp, 3 W. & S. 21 (1841), and see further *post*, Cap. 4.

[115] Camden &c. R. Co. v. Baldauf, *ubi supra;* Phillips v. Earle, 8 Pick. 182 (1829); Boskowitz v. Adams Express Co., 5 Cent. L. J. 58 (1877).

[116] Gibbon v. Paynton, 4 Burr. 2298 (1769).

[117] Chicago &c. R. Co. v. Thompson, 19 Ill. 578 (1858); Magnin v. Dinsmore, 62 N. Y. 35 (1875); Earnest v. Express Co., 1 Woods, 573 (1873); Belger v. Dinsmore, 51 N. Y. 166 (1872).

[118] Everett v. Southern Express Co., 46 Ga. 303 (1872); Sleat v. Fagg, 5 Barn. & Ald. 342 (1822).

[119] Oppenheimer v. United States Express Co., 69 Ill. 62 (1873).

stolen or lost, the carrier is not liable.[120] In all cases of this kind the owner is held to be guilty of constructive fraud, although, in point of fact, no fraud was intended.[121] In further illustration of this important rule requiring fair dealing on the part of the owner, it may be mentioned that if one sends glass articles in a box without informing the carrier of the nature of the articles, and they are broken;[122] or sends a trunk labelled as containing articles of a different and smaller value than those really contained therein, and they are stolen;[123] or sends a check indorsed in blank in a letter without informing the carrier of the contents of the letter, and the letter is stolen;[124] or sends money in a package, knowing that by the rules of the carrier money-packages are required to be put up, indorsed and sealed in a particular way, which requirement is disregarded, and the money is stolen, the carrier will not be liable.[125]

§ 21. *Fraud Always a Bar.*— Other frauds may be committed by the owner on the carrier which will prevent a recovery by the former — as where he obtains from one of several proprietors of a coach an agreement to carry himself, his family, and his goods on a consideration from which the other proprietors are to derive no benefit. Such an agreement is a fraud as to them, is not binding on them, and will not support an action against them.[126]

[120] Tyly v. Morrice, 3 Carth. 485 (1699); Titchburne v. White, 1 Strange, 145 (1718); Earnest v. Express Co., 1 Woods, 579 (1873); Coxe v. Heisley, 19 Pa. St. 243 (1852); Hollister v. Nowlen, 19 Wend. 234 (1838); Everett v. Southern Express Co., 46 Ga. 303 (1872); Cincinnati &c. R. Co. v. Marcus, 38 Ill. 219 (1865); Hellman v. Holladay, 1 Woolw. 365 (1868); Kenrig v. Eggelston, Aleyn, 93; Orange County Bank v. Brown, 9 Wend. 85 (1832).

[121] Chicago &c. R. Co. v. Thompson, 19 Ill. 578 (1858); Cooper v. Berry, 21 Ga. 526 (1857); Great Northern R. Co. v. Shepherd, 14 Eng. Law & Eq. Rep. 367 (1852).

[122] American Express Co. v. Perkins, 42 Ill. 458 (1867).

[123] Relf v. Rapp, *supra*; Hollister v. Nowlen, *supra*.

[124] Hayes v. Wells, 23 Cal. 185 (1863).

[125] St. John v. Express Co., 1 Woods, 612 (1871).

[126] Bignold v. Waterhouse, 1 Mau. & Sel. 255 (1813); Jones v. Sims, 9 Port. 236 (1839).

§ 22. *Losses Caused by Neglect of Owner.*— If goods are sent by a carrier without being legibly marked, in consequence of which the owner sustains a loss or inconvenience, without any fault of the carrier, he can not hold the carrier bound for it.[127] Nor is the latter liable for a loss occasioned by the negligence of the shipper in packing the goods.[128]

§ 23. *Owner Undertaking Part of Carrier's Duties.*— Where the owner himself undertakes a part of the duties which would otherwise devolve on the carrier, the responsibility for results growing out of the discharge of those duties rests on the owner, and the carrier is not liable in respect thereof. If the owner of cattle goes with them on a railway, under an agreement with the railway company to give certain attention to the cattle, the company will not be liable for losses occasioned by his inattention to the duties undertaken by him.[129] In these cases there was negligence on the part of the owner; but negligence is not a necessary element of the rule. Thus, if hogs are sent in a car selected by the owner, and not belonging to the carrier, and they are injured by reason of a defect in such car, the carrier is not liable — at least, if the defect in the car was not known to the latter.[130] There is, of course, a still stronger reason for the application of the rule where the owner of cattle undertakes to put them on a car, and puts them on accordingly, knowing the car to be unsafe, and neglecting to inform the carrier of that fact, and a loss occurs by reason of the defect in the car.[131] But if goods are de-

[127] The Huntress, Davies, 82 (1840); Finn v. Western R. Co., 102 Mass. 283 (1869).

[128] Ang. on Car., sec. 212; Klauber v. American Express Co., 21 Wis. 21 (1866;) The Colonel Ledyard, 1 Sprague, 530 (1860).

[129] South Alabama, &c. R. Co. v. Henlein, 52 Ala. 606 (1875); Tower v. Utica, &c. R. Co., 7 Hill, 47 (1844); Gleason v. Goodrich Transportation Co., 32 Wis. 85 (1873); Roderick v. Railroad Co., 7 W. Va. 54 (1873).

[130] Illinois Cent. R. Co. v. Hall, 58 Ill. 409 (1871).

[131] Retta v. Farmers' Loan Co. 21 Wis. 80 (1866).

livered to a carrier in a storm, and he receives them, his common-law liability at once attaches;[132] and if the goods are placed by a carrier in an open car, when they should have been placed in a closed one, the mere fact that the owner knew of this at the time will not relieve the carrier from responsibility for their safety.[133] So an agreement for the performance of the duties of the carrier in a particular manner will have the effect to relieve him of a part of his responsibilities. Thus, if goods are shipped under a contract that they shall be carried on deck, the shipper, having exercised his judgment as to the place of stowage, takes upon himself all the risk arising therefrom;[134] and if one prefers to send a wagon on a platform-car to taking it to pieces and putting it in a box-car, and it is blown off by the wind, the carrier is not liable.[135] These cases are but illustrations of the principle first laid down in this section, since in each of them the owner uses his own discretion as to the manner of the carriage, instead of leaving the matter wholly to the carrier.

[132] New Brunswick Steam Navigation Co. v. Tiers, 24 N. J. (Law) 677 (1853).

[133] Montgomery &c. R. Co. v. Edmonds, 41 Ala. 667 (1868); Hawkins v. Great Western R. Co., 17 Mich. 57 (1868); Great Western R. Co. v. Hawkins, 18 Mich. 427 (1869).

[134] Lawrence v. Minturn, 17 How. 100 (1854); Chubb v. Renaud, 26 Law Rep. 492 (1864).

[135] Miltimore v. Chicago, &c. R. Co., 37 Wis. 190 (1875); Ross v. Troy, &c. R. Co. 49 Vt. 364 (1877).

CHAPTER II.

THE POWER OF COMMON CARRIERS TO LIMIT THEIR LIABILITY.

SECTION.

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SECTION.
54. The Rule in New Jersey.
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§ 24. *Power Formerly not Admitted.*—In the Doctor and Student, it is said: "If he (the carrier) would *per case* refuse to carry it unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void; for it were against reason and good manners; and so it is in all other cases like." [1] And so in Noys Maxims it is said: "If a carrier would refuse to carry unless a promise were made to him that he shall not be charged with any such miscarriage, that promise is void." [2] In *Hide* v. *Proprietors*,[3] Lord KENYON said: "There is a difference where a man is chargeable by law generally, and where on his own contract. Where a man is bound to any duty and chargeable to a certain extent by the operation of law, in such case he cannot by any act of his own discharge himself," putting the case of common carriers who, he says, can not discharge themselves "by any act of their own, as by giving notice for example to that effect."

§ 25. *Rigor of the Ancient Rule Relaxed.*—Lord KENYON can hardly be considered as meaning that the employer of the carrier could not waive something of the strictness of his rights by a special agreement with the carrier, or that such an agreement would not inure to the

[1] Dial. 2 Ch. 38.
[2] Max. 92.
[3] 1 Esp. 36 (1793).

benefit of the latter though such a construction has been frequently placed on his language.[4] He more probably meant to say that the carrier could not by any *ex parte*, "act of his own" "as by giving notice," unassented to by the other party, "discharge himself." Eleven years later Lord ELLENBOROUGH spoke of the power of carriers to restrict their general liability by express contract as being undoubted.[5] The earliest authority which is cited in support of the relaxation of the ancient rule is the note of Sir Edward Coke to *Southcote's Case*, an authority often quoted on this subject but which is somewhat ambiguous: "*Nota*, reader, it is good policy for him who takes goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance. So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance, which implies that he takes upon to do it."[6] But this case was one against an ordinary bailee without reward, and Coke, apparently, was not speaking of common carriers. Neither was the doctrine that a carrier may limit his liability by a special acceptance definitely acknowledged by Sir MATTHEW HALE in *Morse v. Slue*,[7] as some writers, Brown, Redfield, and Story among others, have said. But by the early part of the present century[8] it was settled in England that common carriers might limit their liabilities by special

[4] As in Hollister v. Nowlen. 19 Wend. 234 (1838).

[5] Nicholson v. Willan, 5 East. 507 (1804).

[6] Southcote's Case, 4 Rep. 84 (1601).

[7] 1 Vent. 190 (1684).

[8] In 1804 Lord Ellenborough remarked: "There is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." Nicholson v. Willan, 5 East 507.

contract,[9] and that they might legally contract for exemption from the consequences of their own neglect[10] and this, outside of the statute law, is the rule in that country at this day.[11]

§ 26. *Regrets at the Abandonment of the Ancient Rule.* —Scarcely, however, had the courts of England established the principle that carriers might limit their general responsibilities by notice or an actual agreement, before they began to express regrets that the common-law rule had not been adhered to as prescribing the measure of the liabilities of the carrier in every instance. Thus in 1812,[12] LEBLANC, J., complained that the exemption of carriers from their general liability had been carried to the utmost extent, and in 1810 MANSFIELD, C. J., had made a like complaint.[13] In *Brooke v. Pickwick*,[14] BEST C. J., said: "I wish that those notices had never been holden sufficient to limit the

[9] Nicholson v. Willan, 5 East, 507 (1804); Anonymous v. Jackson, Peakes Add. Cas. 185 (1800); Covington v. Willan, Gow. 115 (1819); Munn v. Baker, 2 Stark. 255 (1817); Clay v. Willan, 1 H. Bl. 298 (1789); Clarke v. Gray, 6 East 564 (1805); Hyde v. Trent Nav. Co., 5 T. R 389 (1793); Izett v. Mountain, 4 East, 371 (1803); Ranger v. Great Western R. Co., 1 Railway Cas. 1 (1838); Riley v. Horne, 5 Bing. 217 (1828); Harris v. Packwood, 3 Taunt. 264 (1810); Smith v. Horne, 8 Id. 144 (1818); Leeson v. Holt, 1 Stark. 186 (1816); Beck v. Evans, 16 East, 244 (1812); Lowe v. Booth, 13 Price, 329 (1824); Wyld v. Pickford, 8 M. & W. 443 (1841); Carr v. Lancashire &c. R. Co., 7 Exch. 707 (1852).

[10] Maving v. Todd, 1 Stark. 72 (1815); Leeson v. Holt, 1 Stark. 186 (1816).

[11] York, Newcastle &c. R. Co. v. Crisp, 14 C. B. 527 (1854); Slim v. Great Northern R. Co. 14 C. B. 647 (1854); Chippendale v. Lancashire &c. R. Co. 7 Railway Cas. 824 (1851); Great Northern R. Co. v. Morville, 7 Railway Cas. 830 (1852); Austin v. Manchester &c. R. Co., 10 C. B. 454 (1850); *s. c.*, 16 Q. B. 600 (1851): Carr v. Lancashire &c. R. Co., 7 Exch. 707, 7 Railway Cas. 426 (1852); Shaw v. York & North Midland R. Co., 13 Q. B. 347; 6 Railway Cas. 87 (1849); Macauley v. Furness R. Co., 21 W. R. 140. 27 L. T., N. S. 485 (1872); Taubman v. Pacific Steam Nav. Co., 26 L. T., N. S. 704 (1872); Great Western R. Co. v. Glenister, 22 W. R. 72; 29 L. T., N. S. 422 (1873).

[12] Beck v. Evans, 16 East. 244.

[13] Harris v. Packwood, 3 Taunt. 264.

[14] 4 Bing. 218 (1827).

carriers responsibility." In *Nicholson v. Willan*,[15] Lord ELLENBOROUGH said: "We cannot do otherwise than sustain such right in the present instance, however liable to abuse and productive of inconvenience it may be; leaving to the legislature, if it shall think fit, to apply such remedy hereafter as the evil may require." In *Down v. Fromont*,[16] he said: "I am very sorry, for the convenience of trade, that carriers have been allowed to limit their common law responsibility; and some legislative measure upon the subject will soon become necessary." In *Maving v. Todd*,[17] he said: "I am sorry the law is so; it leads to very great negligence." In *Kerr v. Willan*,[18] he said: "All the difficulties arise by a departure from the old law which was acted upon for ages; and there is no doubt but it will require many struggles to get clear of the wisdom of our ancestors." In *Brooke v. Pickwick*,[19] BEST, C. J., said: "Though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the common law meant to guard against." In *Smith v. Horne*,[20] PARKER, J., said: "The doctrine of carriers exempting themselves from liability by notice has been carried much too far," and BURROUGHS, J., added: "I lament that the doctrine of notice was ever introduced into Westminster Hall."

§ 27. *The English Statutes.*—The English courts having thus declared themselves powerless to change a rule of law whose existence their predecessors had created, but which they lamented, Parliament at length came to their rescue. By the Carriers' Act,[21] the provisions of which are given in

[15] 5 East. 507 (1804). In Leeson v. Holt, 1 Stark. 186 (1816), he said that the limitations made in this manner seemed to have excluded all responsibility whatever.

[16] 4 Camp. 40 (1814).

[17] 1 Stark. 72, 4 Camp. 225 (1815).

[18] Holt, 645 (1817).

[19] *Supra.*

[20] Holt, 643, 8 Taunt. 144 (1818).

[21] 11 Geo. 4, 1 Wm. 4 ch. 68.

a subsequent chapter, the effect of notices was much controlled. Several years later the Railway and Canal Traffic Act was passed — a statute which at this day governs the conduct of the greater part of the transportations of Great Britain.[22] By the seventh section of this act a railway or canal company is liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles, goods or things in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition and declaration given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition or declaration being thereby declared null and void. There is a proviso that nothing contained in the act shall be construed to prevent these companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be "just and reasonable." By a second proviso, no greater damages shall be recovered for the loss of, or for any injury done, to any of such animals, beyond the sums after mentioned; that is to say, for any horse, £50; for any neat cattle, per head, £15; for any sheep or pigs, per head, £2; unless the person sending or delivering the same to such company, shall, at the time of such delivery, have declared them to be respectively of a higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in 11 Geo. 4 and

[22] 17 and 18 Vic. ch. 31 (1854).

1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned. By a third proviso, proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury. By a fourth proviso, no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods or things respectively for carriage, and lastly, it is provided that nothing therein contained shall alter or affect the rights, privileges or liabilities of any such company under 11 Geo. 4, and 1 Will. 4, c. 68, "The Carrier's Act," with respect to articles of the description mentioned in that act.

All the parts of sect. 7, of 17 & 18 Vic., c. 31, must be read together, and therefore the conditions there spoken of as capable of being imposed by railway companies, in limitation of their liability as common carriers, must not only be in the opinion of a court or a judge, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner or sender of the goods.[23] The statute extends to cases where a special contract has been signed, in accordance with the proviso in the section that no special contract between company and customer, respecting the receiving of animals, shall be binding, unless it be signed by the customer or person delivering the animals.[24] As said by JERVIS, C. J.[25] "The intention of the legislature in passing the act in question was to place the whole railway system under the control of the court." The numerous decisions which have been made under this statute, except

[23] Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473; 9 Jur. N. S. 914; 32 L. J., Q. B. 241; 11 W. R. 1023; 8 L. T., N. S. 768 (1863).

[24] McManus v. Lancashire &c. R. Co., 4 H. & N. 327; 5 Jur. N. S. 651; 28 L. J., Exch. 353; 33 L. T. 259; Exch. Cham. (1859).

[25] London & Northwestern R. Co. v. Dunham, 18 C. B. 826 (1856).

as to what are "just and reasonable" conditions which are cited in a subsequent chapter, are not given here; they are peculiar to this statute to which we have nothing similar in the legislation of any of the States. As the English Carrier's act of 1830, and the Railway and Canal Traffic Act of 1854, have not been adopted in Canada, the responsibility of a common carrier there rests wholly upon the principles of the common law, and may be so limited by special contract that he shall not be liable, even in case of gross negligence, misconduct, or fraud on the part of his servants.[26]

§ 28. *General Rule in America.*—A common carrier has two distinct liabilities, including first all losses occasioned by accident or mistake and without his fault, where he is liable by the custom of the realm, or the common law, as an insurer, and, second, for all losses occasioned by his default or negligence, where he is liable as an ordinary bailee. In this country it is generally held that he may limit his responsibility as an insurer, by special contract,[27] but that he cannot by any contract exempt himself from responsibility for the consequences of his own negligence, or for the negligence of his servants or agents; contracts of the latter kind being considered as being void because they are against public policy, and because they are supposed to be obtained under circumstances which give to the carrier an undue advantage in obtaining terms which the law cannot enforce without giving its sanction to injustice and oppression. A separate view of the decisions in each State follows this section, from which it will be seen that this may properly be called the American rule, though not applicable to Iowa or Texas where the statutes declare a stricter rule, nor to West Virginia, where a looser doctrine prevails, nor

[26] Dodson v. Grand Trunk R. Co., 7 Canada, L. J. (N. S.) 263 (1870). One riding on a free pass, by the terms of which the person accepting it assumed the risks of accidents and damage, cannot maintain an action for an injury sustained while riding on the pass. Sutherland v. Great Western R. Co., 7 U. C. C. P. 409 (1858). Alexander v. Toronto R. Co., 35 U. C. Q B. 453 (1875).

[27] Barter v. Wheeler, 49 N. H. 9 (1869).

to New York, the leading commercial State of the Union, whose courts beginning in being uncompromising[28] have ended in being wanton.[29]

§ 29. *The Rule in the United States Courts*—In the Federal courts it is held that no contract by a common carrier for an exemption from responsibility can be sustained as being lawful unless it is just and reasonable in the eye of the law, and that a contract by which a carrier would stipulate for exemption from responsibility for the negligence of himself or his servants, is not just and reasonable in the eye of the law.[30] Carefulness and fidelity are essential duties on the part of common carriers of goods and carriers of passengers, say the Supreme Court of the United States, and a failure to perform them is negligence for which the carrier is liable, the distinction between ordinary and gross negligence being unnecessary; public policy demanding that the right of the owner to absolute security against the negligence of the carrier and of all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between the employer and the employee.[31] With this exception the

[28] Gould v. Hill, 2 Hill, 623 (1842).

[29] Perkins v. New York Cent. R. Co., 24 N. Y., 196 (1862); Wells v. New York Cent. R. Co., 24 N. Y. 181 (1862); Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862); Nicholas v. New York Cent. R. Co., 4 Hun, 327 (1875), affirmed by the Court of Appeals (1879).

[30] Railroad Co. v. Lockwood, 17 Wall. 357 (1873); Railroad Co. v. Pratt, 22 Wall. 123 (1874); Earnest v. Express Co., 1 Woods, 573 (1873); Express Co. v. Kountze, 8 Wall. 342 (1869); Hunnewell v. Taber, 2 Sprague, 1 (1854); The Pacific, 1 Deady, 17 (1861); The City of Norwich, 4 Ben. 271 (1870); Railroad Co. v. Manufacturing Co., 16 Wall. 318 (1872); The May Queen, 1 Newb. 465 (1854); The New World v. King, 16 How. 469 (1853); New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344 (1848); York Co. v. Central Railroad, 3 Wall. 107 (1865); The Rocket, 1 Biss. 354 (1860); The David and Caroline, 5 Blatchf. 266 (1865); The Bellona, 4 Ben. 503 (1871); Nelson v. National Steamship Co., 7 Ben. 340 (1874); The Invincible, 1 Lowell, 225 (1868); The Delhi, 4 Ben. 345 (1870), and cases *passim*.

[31] Railroad Co. v. Lockwood, 17 Wall. 357 (1873); Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 4 Cent. L. J., 35 (1876); reversing,

carrier may limit his liability by contract. But he can not do so by notice; and the acceptance by a consignor without objection of a receipt containing notice of exemptions printed on its back, does not amount to such a contract as under the rule here established is required.[82]

§ 30. *Alabama.*— In Alabama the rule is that common carriers may not contract for immunity from the consequences of their own negligence; yet they may contract for exemption from the extreme measure of liability which the common law imposes where no fraud or negligence is impu-

s. c. 1 Cent. L. J. 436 (1874); Railway Co. v. Stevens, 95 U. S. 655, 6 Cent. L. J. 207 (1877).

[82] Railroad Co. v. Manufacturing Co., 16 Wall. 318 (1872); Ayres v. Western Co., 14 Blatch. 9 (1876); The Pacific, 1 Deady, 17 (1861); The May Queen, 1 Newb. 465 (1854).

The other cases in the Federal Courts are: The Antoinetta C., 5 Ben. 564 (1872); The America, 8 Ben. 491 (1876); Anthony v. Ætna Ins. Co., 1 Abb. (U. S.) 343 (1869); Baxter v. Leland, Abb. Adm. 348 (1848); Butler v. The Arrow, 6 McLean, 470 (1855); Bearse v. Ropes, 1 Sprague, 331 (1856); Bazin v. Steamship Co., 3 Wall. Jr., 229 (1857); Bulkley v. Naumkeag Steam Cotton Co., 1 Cliff. 322 (1859), *s. c.*, 24 How. 386 (1860); Broadwell v. Butler, 1 Newb. 171 (1854); *s. c.*, 6 McLean, 296 (1854); Bradstreet v. Heran, 2 Blatchf. 116 (1849); Clark v. Barnwell, 12 How. 272 (1851); Chubb v. Renaud, 26 Law Rep. 493 (1864); Carey v. Atkins, 6 Ben. 562 (1873); The Costa Rica, 3 Sawy. 538 (1875); The Compta, 4 Sawy. 375 (1877); The California, 2 Sawy. 12 (1871); The Columbo, 3 Blatchf. 521 (1856); Dixon v. Columbus &c. R. Co., 4 Biss. 137 (1868); Dibble v. Morgan. 1 Woods, 406 (1873); Dupont v. Vance, 19 How. 162 (1856); Express Co. v. Caldwell, 21 Wall. 264 (1874); The Emma Johnson, 1 Sprague, 527 (1860); The Edwin, 1 Sprague, 477 (1859); The Ethel, 5 Ben. 154 (1871); The Favorite, 2 Biss. 502 (1871); The Gold Hunter, Blatchf. & H. 300 (1832); Garrison v. Memphis Ins. Co., 19 How. 312 (1856); Railway Co. v. Stevens, 94 U. S. 655, 6 Cent. L. J. 207 (1877); Hopkins v. Westcott, 6 Blatchf. 64 (1868); Hunt v. The Cleveland, 6 McLean, 76 (1853); Hooper v. Rathbone, Tan. Dec. 519 (1858); The Isabella, 8 Ben. 139 (1875); The Juniata Paton, 1 Biss. 15 (1852); King v. Shepherd, 3 Story, 349 (1844); Kerr v. The Norman, 1 Newb. 525 (1855); The Keokuk, 1 Biss. 522 (1866); The Lady Pike, 2 Biss. 141 (1869); Lamb v. Parkman, 1 Sprague, 343 (1857); Lawrence v. Minturn, 17 How. 100 (1854); The Live Yankee, 1 Deady, 420 (1868); Leary v. United States, 14 Wall. 607 (1871); The Miletus, 5 Blatch. 335 (1866); The Mohawk, 8 Wall. 153 (1868); Merrill v. Arey, 3 Ware, 215 (1859); The Mollie Mohler, 2 Biss. 505 (1871); The Milwaukee Belle, 2 Biss. 197 (1869); Menzell v. Railway Co., 1 Dillon, 531 (1870); Nelson

table to them.[33] They can not limit their liability by a notice inserted in a receipt unassented to by the shipper.[34] That the goods were taken "at the owner's risk" only affects the liability of the carrier as an insurer.[35]

§ 31. *Arkansas.*— There has been no direct adjudication on this subject in Arkansas; but it has been held in that State that a stipulation in a bill of lading given by a carrier, limiting his liability to loss or damage occurring on his own line, was binding on the bailor.[36]

§ 32.—*California.*—Only one decision in point is to be

v. Woodruff, 1 Black, 156 (1861); The Newark, 1 Blatchf. 203 (1846); Nemours v. Vance, 19 How. 162 (1856); The Niagara v. Cordes, 21 How. 7 (1858); The Ocean Wave, 3 Biss. 317 (1872); The Oriflamme, 1 Sawy. 176 (1870); The Olbers, 3 Ben. 148 (1869); The Pereire, 8 Ben. 301 (1875); The Portsmouth, 9 Wall. 682 (1869); Philadelphia &c. R. Co. v. Derby, 14 How. 468 (1852); Railroad Co. v. Androscoggin Mills, 22 Wall. 594 (1874); The Reeside, 2 Sum. 567 (1837); The Rebecca, 1 Ware, 188 (1831); Ray v. The Milwaukee Belle, 18 Am. L. T. Rep. 65 (1869); The Santee, 2 Ben. 519 (1868); St. John v. Express Co., 1 Woods, 612 (1871); Six Hundred and Thirty Casks, 14 Blatchf. 517 (1878); Speyer v. The Mary Belle Roberts, 2 Sawy. 1 (1871); The Star of Hope, 17 Wall. 651 (1873); Southern Express Co. v. Dickson, 94 U. S. 549 (1876); Turner v. The Black Warrior, 1 McAll. 181 (1856); Transportation Co. v. Downer, 11 Wall. 129 (1870); Twelve Hundred, &c. Pipes, 5 Ben. 402 (1871); Van Schaack v. Northern Transportation Co., 3 Biss. 394 (1872); The Vivid, 4 Ben. 319 (1870); Van Syckel v. The Ewing, Crabbe, 405 (1840); Vaughan v. 630 Casks, 7 Ben. 506 (1874); The Wathan, 13 Op., Atty. Gen. 119 (1869).

[33] Grey v. Mobile Trade Co., 55 Ala. 387 (1876); Steele v. Townsend, 37 Ala. 247 (1861); South & North Alabama R. Co. v. Henlein, 52 Ala. 606 (1875), *s. c.*, 56 Ala. 368 (1876); Southern Ex. Co. v. Armstead, 50 Ala. 350 (1873); Southern Ex. Co. v. Crook, 44 Ala. 468 (1870); Mobile &c. R. Co. v. Hopkins, 41 Ala. 486 (1868).

[34] Southern Ex. Co. v. Armstead, 50 Ala. 350 (1873); Southern Ex. Co. v. Crook, 44 Ala. 468 (1870); Southern Ex. Co. v. Caperton, 44 Ala. 101 (1870).

[35] Mobile &c. R. Co. v. Jarboe, 41 Ala. 644 (1868).

The other cases in this State are: Hibler v. McCartney, 31 Ala. 501 (1858); Jones v. Pitcher, 3 St. & P. 135 (1833); McClure v. Cox, 32 Ala. 617 (1858); Sampson v. Gazzam, 6 Port. 123 (1837); Ezell v. Miller, 6 Port. 307 (1838); Ezell v. English, 6 Port. 311 (1838); Wayland v. Moseby, 5 Ala. 430 (1843); Cox v. Peterson, 30 Ala. 608 (1857).

[36] Taylor v. Little Rock &c. R. Co., 32 Ark. 393 (1877).

found in the reports of this State. In that case a receipt given by an express company for a package of gold dust contained this condition: "It is further agreed and is part of the consideration of this contract that Wells, Fargo & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, &c., unless specially insured by them and so specified in this receipt." This limitation was held not to discharge the company from liability for a loss caused by the negligence of the officers of a vessel employed by the express company to transport the goods named in the receipt. The court simply construed the receipt without deciding the question whether or not a common carrier could contract for exemption for negligence.[37]

[37] Hooper v. Wells, 27 Cal. 11 (1864). Sawyer, J., who delivered the opinion of the court, said: "We think it can not be said that the contract in question in clear and unequivocal terms necessarily evinces an intention on the part of both parties, or of either party, that defendants shall be exonerated from any loss resulting from negligence in the agencies employed by them in the transportation of treasure committed to their care. If such had been the intention it certainly could and doubtless would have been expressed in language about which there could have been no misapprehension by either party. Nothing is said about negligence. The language used is not such as necessarily expresses, or as men would ordinarily employ to express, the idea now claimed for it, and if so used it would be likely to mislead a party to whom it is tendered ready executed upon the receipt of his property for transportation. That plaintiff could not have understood the contract in the sense claimed for it by the defendants seems in the highest degree probable, for it can scarcely be credited that a man of ordinary capacity and intelligence would commit so valuable a package to others to be transported a long distance without supposing that somebody would be responsible to him for at least good faith and ordinary care during the transit. But if the construction claimed for the stipulation in question is to prevail, the defendants were neither responsible themselves for ordinary care, after the treasure left their office at Los Angeles, nor bound to take the measures prescribed by the statute to make the owners of the vessels used by them as a means of transportation responsible. The language of the stipulation under consideration, at least admits of the construction which we have given it; and to hold that the exception includes losses arising from negligence would, in our judgment, be to adopt a strained construction in favor of defendants, and to depart from its obviou sim-

§ 33. *Colorado.*—A common carrier may contract for exemption from accidental losses, but not from negligent ones.[38]

§ 34. *Connecticut.*—A common carrier may limit his liability by contract except for negligence,[39] but not by a notice unassented to.[40]

§ 35. *Delaware*—In the only case in this State, the question was not directly passed upon.[41] The rule would probably be as in Connecticut.

§ 36. *Florida.*—No case on the exact point has yet arisen in Florida.[42]

§ 37. *Georgia.*—In the earliest case in this State, *Fish v. Chapman*,[43] decided in 1847, it was held that notices, receipts, and contracts in restriction of the liability of a common carrier, were void as against public policy. This decision is based principally on *Gould v. Hill*,[44] a case

port, while, as we have seen the rule to be, the construction must be most strictly against the defendants. Holding, as we do, that the exception in the contract, for the reasons stated, does not exempt the defendants from losses resulting from the negligence of those in charge of the steam tug, it becomes unnecessary to determine the more difficult question, in the present state of the authorities, as to the power of common carriers by special contract to exonerate themselves from liabilities arising from the negligence of those employed by them in their business of carriers."

[38] Merchants Despatch &c. Co. v. Cornforth, 3 Col. 280 (1877); Western Union Telegraph Co, v. Graham, 1 Col. 230 (1871). These are all the cases in this State.

[39] Welch v. Boston, &c. R. Co., 41 Conn. 333 (1874). Derwort v. Loomer, 21 Conn. 245 (1851); Camp v. Hartford &c. Steamboat Co., 43 Conn. 333 (1876); Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869); Hale v. New Jersey Steam Nav. Co., 15 Conn. 539 (1843).

[40] Peck v. Weeks, 34 Conn. 145 (1867). The remaining cases in this State are Williams v. Grant, 1 Conn. 487 (1816); Lake v. Hurd, 38 Conn. 536 (1871); Crosby v. Fitch, 12 Conn. 410 (1838); Converse v. Norwich &c. Trans. Co., 33 Conn. 166 (1865.)

[41] Flinn v. Philadelphia &c. R. Co., 1 Houst. 469 (1857).

[42] See Bennett v. Filyaw, 1 Fla. 403 (1847); Brock v. Gale, 14 Fla. 523 (1874).

[43] 2 Ga. 349.

[44] 2 Hill, 623 (1842).

which has since been overruled.[45] It is very clear that it was not at all necessary to consider in *Fish v. Chapman* the question whether a carrier can limit his liability as an insurer by a special contract, as the evidence showed negligence on the part of the carrier. The facts in *Campbell v. Morse*,[46] where the carrier was held liable on the ground of negligence, were almost identically the same. Five years later an exception in a bill of lading of the "damage of the seas," was sustained.[47] In *Cooper v. Berry*,[48] the matter was again considered and *Fish v. Chapman* was overruled, it being now held by the Supreme Court that an exception of loss by fire in a bill of lading was valid, although there was no other express contract to that effect. In this case cotton was shipped on a steamer running on a river. It was the custom of all boats to give bills of lading containing an exception against fire, which was well known to the agent of the shipper, who on giving an order for the cotton said that he did not want any bill of lading as he did not know that all the cotton was at the landing; the clerk of the steamer on receipt of the cotton made out a bill of lading, containing an exception of perils by fire, but the bill of lading and the cotton were soon after burnt with the boat. The court, McDONALD, J., dissenting, held that the loss of the cotton must fall on the owner of it. When the case came before the court again in *Berry v. Cooper*,[49] the court adhered to the same doctrine, but held that an exception as to fire would not relieve the carrier from liability caused by his own negligence or that of his servants.

After these a statute was passed requiring the express assent of the owner to any contract limiting the liability of a carrier; and it was held in *Southern Express Company v.*

[45] See *post* § 55.
[46] Harp, 468 (1824).
[47] Brown v. Clayton, 12 Ga. 564 (1853).
[48] 21 Ga. 526 (1857).
[49] 28 Ga. 543 (1859).

Newby,[50] that such assent would not be presumed from a mere acceptance of a receipt containing the condition of limitation, except as to a condition limiting the amount of liability to a fixed sum unless a greater sum should be specified in the receipt. But the express contract required by the statute may be made by parol, and parol evidence is admissible to show such a contract although a receipt was given by a clerk of the carrier, which contained no restrictive clause.[51] Where the owner of the goods fills up a receipt for them, which is signed by the carrier and returned to him, containing a printed clause limiting the liability of the carrier, he knowing the terms of the clause, this is an express contract under the statute.[52] In fine if the owner assent to the terms of a receipt given to him by the carrier, this will be an express contract, and the question as to the assent is one to be decided by the jury from all the circumstances in the case.[53]

§ 38. *Illinois*.—In Illinois, common carriers may limit their liability by express contract; but a contract must be shown; a general notice by advertisement, or by conditions printed on the back of a bill of lading, receipt, ticket or other voucher will not do.[54] Conditions inserted in a receipt or bill of lading and assented to by the shipper will bind the latter, for in such a case the minds of the parties meeting as to the conditions on which the property is to be carried, a contract is made in the terms of the

[50] 36 Ga. 635 (1867), and see Mosher v. Southern Ex. Co., 38 Ga. 37 (1868).

[51] Purcell v. Southern Express Co., 34 Ga. 315 (1866); Southern Express Co. v. Barnes, 36 Ga. 532 (1867).

[52] Wallace v. Matthews, 39 Ga. 617 (1869).

[53] Wallace v. Sanders, 42 Ga. 486 (1871). The other cases are Berry v. Cooper, 28 Ga. 543 (1859); Southern Express Co. v. Newby, 36 Ga. 635 (1867); Southern Express Co. v. Urquhart, 52 Ga. 142 (1874); Central Line v. Lowe, 50 Ga. 509 (1873); East Tennessee R. Co. v. Montgomery, 44 Ga. 278 (1871).

[54] Western Trans. Co. v. Newhall, 24 Ill. 466 (1860); Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88 (1870).

receipt or bill of lading.[55] And even by express contract they are not allowed to avoid their liability for losses caused by their own or their servants' negligence or wilful misconduct,[56] or by the lack of reasonable care,[57] as, for example failing to provide cars with the most improved platforms.

§ 39. *Indiana.*—In Indiana a common carrier may by contract limit his common law liability except for negligence.[59] But not by notice.[60]

[55] Anchor Line v. Dater, 68 Ill. 369 (1873); Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88 (1870); Western Trans. Co. v. Newhall, 24 Ill. 466 (1860); Field v. Chicago, etc., R. Co., 71 Ill. 458 (1874); Ill. Cent. R. Co. v. Morrison, 19 Ill. 136 (1857); Chicago, etc., R. Co. v. Montfort, 60 Ill. 175 (1871); Ill. Cent. R. Co. v. Smyser, 38 Ill. 354 (1865); Ill. Cent. R. Co. v. Read, 37 Ill. 484 (1865); Boskowitz v. Adams Ex. Co. 5 Cent. L. J., 58 (1877): Baker v. Michigan &c. R. Co., 42 Ill. 73 (1866); Erie &c. Transportation Co. v. Dater, 8 Cent. L. J., 293 (1879); Merchants Dispatch Trans. Co. v. Theilbar, 86 Ill. 71 (1877).

[56] Ill. Cent. R. Co. v. Adams, 42 Ill. 474 (1867); Ill. Cent. R. Co. v. Morrison, 19 Ill. 136 (1857); Boskowitz v. Adams Ex. Co., 5 Cent. L. J., 58 (1877); Ill. Cent. R. Co. v. Smyser, 38 Ill. 354 (1865); Erie R. Co. v. Wilcox, 84 Ill. 239 (1876).

[57] Adams Ex. Co. v. Stettaners, 61 Ill. 184 (1871).

[58] Boskowitz v. Adams Ex. Co., 5 Cent. L. J., 58 (1877). The other cases in this State are: Baker v. Michigan &c. R. Co., 42 Ill. 73 (1866); Oppenheimer v. United States Ex. Co., 69 Ill. 62 (1873); Pennsylvania Co. v. Fairchild, 69 Ill. 260 (1873); Adams Express Co. v. Haynes, 42 Ill. 89 (1866); Milwaukee &c. R. Co. v. Smith, 74 Ill. 197 (1874); Northern Line Packet Co. v. Shearer, 61 Ill. 263 (1871); Merchants Dispatch Trans. Co. v. Bolles, 80 Ill. 473 (1875); Indianapolis &c. R. Co. v. Strain, 81 Ill. 504 (1876); Tyler v. Western Union Telegraph Co., 60 Ill. 421 (1871); Illinois Cent. R. Co. v. McClellan, 54 Ill. 58 (1870); American &c. Ex. Co. v. Schier, 55 Ill. 140 (1870); Dunseth v. Wade, 3 Ill. 285 (1840); American Express Co. v. Perkins, 42 Ill. 458 (1867).

[59] St. Louis &c. R. Co. v. Smuck, 49 Ind. 302 (1874); Michigan, &c., R. Co. v. Heaton, 37 Ind. 448 (1871); Ohio &c., R. Co. v. Selby, 47 Ind. 471 (1874); United States Express Co. v. Harris, 51 Ind. 127 (1875); Adams Express Co. v. Reagan, 29 Ind. 21 (1867); Indianapolis &c. R. Co. v. Allen, 31 Ind. 394 (1869); Wright v. Gaff, 6 Ind. 416 (1855); Thayer v. St. Louis &c. R. Co. 22 Ind. 26 (1864); Adams Express Co. v. Fendrick, 38 Ind. 150 (1871).

[60] Indianapolis &c. R. Co. v. Cox, 29 Ind. 360 (1868); Evansville &c. R. Co. v. Young, 28 Ind. 516 (1867). The other cases are: Baltimore &c., R. Co. v. McWhinney, 36 Ind. 436 (1871); Indiana Cent. R. Co. v. Mundy, 21 Ind. 48 (1863); Indianapolis &c. R. Co. v. Beaver, 41 Ind.

§ 40. *Iowa.*—In this State it is provided by statute[61] that "in the transportation of persons or property by any railroad or other company or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule or regulation shall exempt such railroad or other company, person or firm from the full liabilities of a common carrier, which in the absence of any contract, receipt, rule or regulation would exist with respect to such persons or property," This statute does not affect contracts for the carriage of goods beyond the carriers own line,[62] but applies to all contracts made in this State, though to be performed in a State where no such legislation exists.[63] Another statute enacts that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding." [64] But prior to the passage of these statutes the Supreme Court of this State had refused to release to any extent the common law responsibility of carriers.[65] The statute first cited covers the carriage of live stock.[66]

493 (1873); Walpole v. Bridges, 5 Blackf. 222 (1839); Indianapolis &c R. Co. v. Remmy, 13 Ind. 518 (1859); United States Express Co. v. Rush, 24 Ind. 403 (1865); Jeffersonville &c., R. Co. v. Worland, 50 Ind. 339 (1875); United States Express Co. v. Keefer, 59 Ind. 263 (1877).

[61] Laws 1866, c. 13, p. 121.

[62] Mulligan v. Illinois Cent. R. Co. 36 Iowa, 180 (1873).

[63] McDaniel v. Chicago &c. R. Co. 24 Iowa, 412 (1868).

[64] Code § 1307, and see Rose v. Des Moines &c., R. Co. 39 Iowa, 246 (1874).

[65] Whitmore v. Bowman, 4 G. Greene, 148 (1853); Carson v. Harris, Id. 516 (1854).

[66] McCoy v. Keokuk &c. R. Co. 44 Iowa, 424 (1876); Brush v. S. A. & D. R. Co. 43 Iowa, 554 (1876). The other cases in Iowa are: Talbot v. Merchants Dispatch Trans. Co. 41 Iowa, 247 (1875); Robinson v. Merchants Dispatch Trans. Co. 45 Iowa, 470 (1877); German v. Chicago &c. R. Co. 38 Iowa, 127 (1874); West v. The Berlin, 3 Iowa, 532 (1856); Wilde v. Merchants Dispatch Trans. Co. 47 Iowa, 272; Id. 247 (1877); Bancroft v. Merchants Dispatch Trans. Co. 47 Iowa, 262 (1877);

§ 41. *Kansas.*—A common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract; but not from liability for his negligence.[67]

§ 42. *Kentucky.*—The rule in Kentucky is that carriers may limit their common law liability by special contract made without duress, imposture or delusion,[68] but not for negligence, whether ordinary or gross.[69] But they can not limit their liability by a general notice.[70]

§ 43. *Louisiana.*—A common carrier may restrict his liability by express special contract (not by notice), but is liable nevertheless for the carelessness or unskilfulness of his servants.[71] In *Higgins v. New Orleans &c. Railroad Company*,[72] a case of an injury to a person while riding on a pass which was given under an agreement that the plaintiff would assume all risk of injury, the court said: "Is the agreement

Stewart v. Merchants Dispatch Trans. Co. 47 Iowa, 229 (1877); The Wisconsin v. Young, 3 G. Greene, 268 (1851); Mitchell v. United States Express Co. 46 Iowa, 214 (1877).

[67] Goggin v. Kansas &c., R. Co., 12 Kas. 416 (1874); Missouri &c., R. Co. v. Caldwell, 8 Kas. 244 (1871); Kansas &c., R. Co. v. Reynolds, 8 Kas. 623 (1871); Kallman v. United States Ex. Co. 3 Kas. 205 (1865); Kansas &c., R. Co. v. Nichols, 9 Kas. 225 (1872); St. Louis &c. R. Co. v. Piper, 13 Kas. 505 (1874); see also Leavenworth &c. R. Co. v. Maris, 16 Kas. 333 (1876); The Emily v. Carney, 5 Kas. 645 (1864).

[68] Adams Ex. Co. v. Guthrie, 9 Bush. 78 (1872); Adams Ex. Co. v. Nock, 2 Duv. 562 (1866).

[69] Louisville &c. R. Co. v. Hedger, 9 Bush. 645 (1873); Rhodes v. Louisville &c. R. Co., 9 Bush. 688 (1873); Orndorff v. Adams Ex. Co., 3 Bush. 194 (1867); Reno v. Hogan, 12 B. Mon. 63 (1851).

[70] Louisville &c. R. Co. v. Hedger, 9 Bush. 645 (1873); Adams Express Co. v. Nock, 2 Duv. 562 (1866); Louisville &c. R. Co. v. Brownlee, 9 Cent. L. J. 101 (1879). See also Adams Express Co. v. Loeb, 7 Bush, 499 (1870); Bryan v. Memphis &c. R. Co., 11 Bush. 597 (1875); Cassilay v. Young, 4 B. Mon. 265 (1843); Gowdy v. Lyon, 9 B. Mon. 112 (1848); Keith v. Amende, 1 Bush. 455 (1866).

[71] Roberts v. Riley, 15 La. Ann. 103 (1860); Simon v. The Fung Shuey, 21 La. Ann. 363 (1869); New Orleans Mut. Ins. Co. v. New Orleans &c. R. Co., 20 La. Ann. 302 (1868); Baldwin v. Collins, 9 Rob. 468 (1845).

[72] 28 La. Ann. 133 (1876).

The other cases in this State are: Mahon v. The Olive Branch, 18 La. Ann. 107 (1866); Frank v. Adams Express Co., 18 La. Ann. 279 (1866);

lawful? All contracts may be made except those reprobated by law or public policy, and a contract by which one stipulates for exemption from responsibility for losses occasioned to another from the negligence of his agents or servants, is not against public policy or forbidden by law; but if the losses resulted from the fraudulent, wilful or reckless misconduct of the agent or employee, it would be." One judge dissented from this doctrine.

§ 44. *Maine.*—In Maine the liability of a common carrier by the common law, may be restricted by notice, but not unless the customer has knowledge of the notice, and either expressly or impliedly assents thereto, and in no case where the loss or damage arises from misconduct or negligence.[73]

§ 45. *Maryland.*—In 1818 the question came before the Supreme Court of Maryland whether a carrier could limit his liability by a general notice, but the court waived the question, holding that the notice in that case was ambiguous and therefore inoperative.[74] In *Brehme v. Adams Express Company*,[75] decided in 1866, the court said that the right of

Dunn v. Branner, 13 La. Ann. 452 (1858); Levois v. Gale, 17 La. Ann. 302 (1865); Boyce v. Welch, 5 La. Ann. 623 (1850); Kember v. Southern Express Co., 22 La. Ann. 158 (1870); Flash v. New Orleans &c. R. Co., 23 La. Ann. 353 (1871); Oakey v. Gordon, 7 La. Ann. 235 (1852); Fassett v. Ruark, 3 La. Ann. 694 (1848); Hunt v. Morris, 6 Mart. 676 (1819); Wentworth v. The Realm, 16 La. Ann. 18 (1861); Hatchett v. The Compromise, 12 La. Ann. 783 (1857); Lewis v. The Success, 18 La. Ann. 1 (1866); Edwards v. The Cahawba, 14 La. Ann. 224 (1859); Levy v. Pontchartrain R. Co., 23 La. Ann. 477 (1871); Price v. The Uriel, 10 La. Ann. 413 (1855); Brauer v. The Almoner, 18 La. Ann. 266 (1866); Kelham v. The Kensington, 24 La. Ann. 100 (1872); Thomas v. The Morning Glory, 13 La. Ann. 269 (1858); Van Hern v. Taylor, 7 Rob. 201 (1844); Van Horn v. Taylor, 2 La. Ann. 587 (1847).

[73] Sager v. Portsmouth &c. R. Co., 31 Me. 228 (1850); Fillebrown v. Grand Trunk R. Co., 55 Me. 462 (1867); Bean v. Green, 12 Me. 422 (1835); Little v. Boston &c. R. Co., 66 Me. 239 (1876); Willis v. Grand Trunk R. Co., 62 Me. 488 (1873).

The other cases are: Burnham v. Grand Trunk R. Co., 63 Me. 298 (1873); Plaisted v. Boston &c. Navigation Co., 27 Me. 132 (1847).

[74] Barney v. Prentiss, 4 H. & J. 317.

[75] 25 Md. 328.

carriers to restrict their common law liability by express contract was too well established to be any longer questioned.[76] The question of general notice was waived here also. Again, nine years later, in *McCoy v. Erie &c. Transportation Company*,[77] the court said that common carriers may, by special contract, limit their common law liability where there seems to be reason and justice to sustain the exemption. But the contract ought to be in clear and distinct terms.

§ 46. *Massachusetts.*—In *Buckland v. Adams Express Company*,[78] it is said: "It is no longer open to controversy in this State that a common carrier may limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him,"[79] which is equivalent to saying that he may do so by contract[80] except for negligence.[81]

[76] Followed in Baltimore &c. R. Co. v. Brady, 32 Md. 333 (1869); Bankard v. Baltimore &c. R. Co. 34 Md. 197 (1870).

[77] 42 Md. 498 (1875).

The other cases are: Ferguson v. Cappeau, 6 H. & J. 394 (1825); Boyle v. McLaughlin, 4 H. & J. 291 (1817); Fergusson v. Brent, 12 Md. 9 (1857); Birney v. New York &c. Telegraph Co., 18 Md. 341 (1862); McCann v. Baltimore &c. R. Co., 20 Md. 202 (1863); McClure v. Philadelphia R. Co., 34 Md. 532 (1871).

[78] 97 Mass. 124 (1867).

[79] To the same effect are Brown v. Eastern R. Co. 11 Cush. 97 (1853); Gott v. Dinsmore, 111 Mass. 45 (1872); Malone v. Boston &c. R. Co. 12 Gray, 388 (1859); Judson v. Western R. Co. 6 Allen, 485 (1863); Perry v. Thompson, 98 Mass. 249 (1867).

[80] Grace v. Adams, 100 Mass. 505 (1868); Hoadley v. Northern Trans. Co. 115 Mass. 304 (1874); Pemberton Co. v. New York Cent. R. Co. 104 Mass. 144 (1870); Squire v. New York Cent. R. Co. 98 Mass. 239 (1867).

[81] School District v. Boston &c. R. Co. 102 Mass. 552 (1869). The other cases in this State relating to the topics of this treatise are: Gage v. Tirrell, 9 Allen, 299 (1864); Tirrell v. Gage, 4 Allen, 245 (1862); Com. v. Vermont &c. R. Co. 108 Mass. 7 (1871); Sullivan v. Thompson, 99 Mass. 259 (1868); Packard v. Earle, 113 Mass. 280 (1873); Alden v. Pearson, 3 Gray, 342 (1855); Sanford v. Housatonic R. Co. 11 Cush. 155 (1853); Dwight v. Brewster, 1 Pick. 50 (1822); Barrett v. Rogers, 7 Mass. 297 (1811); Hastings v. Pepper. 11 Pick. 41 (1831); Phillips v. Earle, 8 Pick. 182 (1829); Knowles v. Dabney, 105 Mass. 437 (1870);

§ 47. *Michigan.*—In 1853 it was decided by a divided court that the common law liability of a carrier could not be limited by contract.[82] Six years later, however, this case was expressly overruled.[83] A common carrier may limit his liability by contract but not by notice.[84] It is declared in this State by statute that no railroad company shall be permitted to change or limit its common law liability as a common carrier by any contract or in any other manner except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried.[85]

§ 48. *Minnesota.*—In Minnesota a carrier may limit his liability as an insurer but is not permitted to exonerate himself from liability for his own negligence or the negligence of the agents whom he employs to perform the transportation.[86]

§ 49. *Mississippi.*—Although in 1849 an exception of the "dangers of the river" was sustained,[87] the power of common carriers to limit their liability by contract, was for some time an open question in this State. In *Southern Express Company v. Moon*, decided in 1863,[88] where it was

Ellis v. American Telegraph Co. 13 Allen, 226 (1866); Burroughs v. Norwich &c. R. Co. 100 Mass. 26 (1868); Pendergast v. Adams Express Co. 101 Mass. 120 (1869).

[82] Michigan Cent. R. Co. v. Ward, 2 Mich. 538.

[83] Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859).

[84] American Trans. Co. v. Moore, 5 Mich. 368 (1858); McMillan v. Michigan &c. R. Co. 16 Mich. 79 (1867). The other cases are: Sisson v. Cleveland &c. R. Co. 14 Mich. 489 (1866); Cleveland &c. R. Co. v. Perkins, 17 Mich. 296 (1868); Great Western R. Co. v. Hawkins, 18 Mich. 427 (1869); Hawkins v. Great Western R. Co. 17 Mich. 57 (1868); Merrick v. Webster, 3 Mich. 268 (1854); Detroit &c. R. Co. v. Adams, 15 Mich. 458 (1867); Gordon v. Ward, 16 Mich. 360 (1868); Western Union Tel. Co. v. Carew, 15 Mich. 525 (1867).

[85] Mich. Comp. L. 1871, p. 783, sec. 2386.

[86] Christenson v. American Express Co., 15 Minn. 270 (1870); Jacobus v. St. Paul &c. R. Co., 20 Minn. 125, 1 Cent. L. J., 125 (1873).

See, also, Cowley v. Davidson, 13 Minn. 92 (1868); Christian v. St. Paul &c. R. Co., 20 Minn. 21 (1873).

[87] Whitesides v. Thurlkill, 12 S. & M. 599.

[88] 39 Miss. 822.

provided in an receipt given by an express company that the company should not be liable for dangers of railroad, ocean, steam, or river navigation, etc., and that if the value was not stated the company should not be liable for over $50, it was held that the receipt was not binding on the bailor unless there was an express assent on his part, with a full knowledge of the terms of the special contract and of the legal rights thereby waived, and that there must be a consideration for such a waiver. The court did not make any discrimination between the different clauses in the receipt; nor did it pass upon the question as to the power of the company to limit its liability in any mode. "The public policy," it was said, "on which the extraordinary liability of common carriers is founded, is too important to be thus virtually repealed by the fraud and circumvention of artfully contrived printed or prepared receipts thrust upon those to whom the hurry and press of railroad travel denies the time for examination or the opportunity of fair assent." In the same year an act was passed prohibiting railroad companies from limiting their liability by contract.[89] But this statute was repealed by the Code of 1871; and in 1874 it was decided that in Mississippi a carrier may by contract, but not by notice, provide for a limitation of or exemption from liability for losses arising from those accidents and casualities which prudence, skill, and care can not always prevent or guard against.[90]

§ 50. *Missouri.*— A common carrier may limit his liability by contract, but can not exempt himself from that responsibility which every bailee assumes for ordinary care and common honesty.[91] "He can not vary his liability by

[89] Mobile &c. R. Co. v. Franks, 41 Miss. 494 (1867).

[90] Mobile &c. R. Co. v. Weiner, 49 Miss. 725 (1874).

The other cases in this State are Gilmore v. Carman, 1 S. & M. 279 (1843); Neal v. Saunderson, 2 S. & M. 572 (1844); Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458 (1872); Southern Express Co v. Hunnicutt, 54 Miss. 566 (1877).

[91] Ketchum v. American &c. Ex. Co., 52 Mo. 390 (1873); Lupe v. Atlantic &c. R. Co., 3 Mo. (App.) 77 (1876); Cantling v. Hannibal &c. R. Co.,

inserting conditions in his acceptance of goods, but to have the effect of exonorating him, there must be a special contract assented to by the shipper. The argument in favor of the right of the carrier to vary his liability by introducing conditions into his acceptance, is founded on a misconception in considering that his liability is voluntary and arises *ex contractu*. The law attaches the responsibility to his employment or calling, and if he assumes that calling, he has no power over the duties which the law annexes to his calling. His assuming the character of a common carrier depends entirely on his own will and assent; but if he undertakes that occupation, the liabilities which come upon him, in respect of goods brought or borne to him to be carried, are imposed by law and not created by assent or agreement. * * Public policy and fair dealing, on which the extraordinary liability of a common carrier is founded, can not be undermined and frustrated by the design and circumvention of artfully prepared printed receipts, contrived by scheming corporations and soulless companies, thrust upon the public without an opportunity of fair assent in the

54 Mo. 385 (1873); Levering v. Union Trans. &c. Co., 42 Mo. 88 (1867); Rice v. Kansas &c. R. Co., 63 Mo. 314 (1876); Sturgeon v. St. Louis &c. R. Co., 65 Mo. 569 (1877); Oxley v. St. Louis &c. R. Co., 65 Mo. 629 (1877); Clark v. St. Louis &c. R. Co., 64 Mo. 440 (1877); Snider v. Adams Ex. Co. 63 Mo. 376, 4 Cent. L. J. 179 (1876); Read v. St. Louis &c. R. Co., 60 Mo. 199 (1875). "There can be but little doubt as to what is the doctrine in this State on the subject. A common carrier may, by contract, restrict his liability as an insurer, but his duties as a common carrier do not originate in contract, and he will not be permitted, whilst acting as a common carrier for hire, to shirk the responsibilities which the law affixes to his calling and to assume the position of an ordinary bailee. The law still holds him to a higher degree of care than that required of a private carrier, and the rule of evidence which, for the wisest reasons, has been adopted in this regard, must still prevail. The consignor does not accompany his goods; the carrier does. The carrier must account for them, and if they are lost, whatever agreement he may have made with the owner, the law will presume that they are lost by his fault, and in the absence of testimony to rebut this presumption, he must pay their value." Bakewell, J., in Kirby v. Adams Express Co., 2 Mo. (App.) 369, 3 Cent. L. J. 435 (1876); Drew v. Red Line Transit Co., 3 Mo. (App.) 495 (1877).

press and hurry of railroad travel." [92]

§ 51. *Nebraska.*— In Nebraska a common carrier can not by contract absolve himself from the consequences of his negligence.[93]

§ 52. *Nevada.*— There are no decisions on this question in this State.

§ 53. *New Hampshire.*—In *Bennett v. Dutton*,[94] decided in 1839, the rule laid down by the Supreme Court of New York in *Hollister v. Nowlen* [95] that common carriers by a general notice that the baggage of passengers is at the risk of the owners can not alter their own liability was cited with approval by the chief justice, though the case did not turn on this point. But in 1851 the Supreme Court of New Hampshire, in an opinion remarkable for its learning and research, decided that a notice unassented to by the shipper was of no avail to restrict the liability of the carrier.[96] His liability may nevertheless be restricted by contract.[97]

§ 54. *New Jersey.*—The question has not often arisen in this State. In *Gibbons v. Wade*, decided in 1826,[98] the court refused to pass upon the legal effect of a notice given

[92] Levering v. Union Trans. &c. Co., 42 Mo. 88 (1867).

The remaining cases in this State on the general questions of this treatise are: Bird v. Cromwell, 1 Mo. 81 (1821); Little v. Semple, 8 Mo. 99 (1843); Hill v. Sturgeon, 28 Mo. 323 (1859); Carr v. The Michigan, 27 Mo. 196 (1858); Sturgess v. The Columbus, 23 Mo. 230 (1856); Smith v. Whitman, 13 Mo. 352 (1850); Collier v. Valentine, 11 Mo. 299 (1848); Tuggle v. St. Louis &c. R. Co., 62 Mo. 425 (1876); Landes v. Pacific R. Co., 50 Mo. 346 (1872); Schutter v. Adams Express Co., 5 Mo. (App.) 316 (1878); The Missouri v. Webb, 9 Mo. 193 (1845); Coates v. United States Express Co., 45 Mo. 238 (1870); Daggett v. Shaw, 3 Mo. 264 (1833); Wolf v. American Express Co., 43 Mo. 421 (1869).

[93] Atchison &c. R. Co. v. Washburn, 5 Neb. 117 (1876.)

[94] 10 N. H. 481.

[95] 19 Wend. 234 (1838).

[96] Moses v. Boston &c. R. Co. 24 N. H. 71 (1851).

[97] Moses v. Boston &c. R. Co. 24 N. H. 71 (1851); Barter v. Wheeler, 49 N. H. 9 (1869).

See also Harris v. Rand, 4 N. H. 259 (1827); Graves v. Ticknor, 6 N. H. 537 (1834); Gray v. Jackson, 51 N. H. 9 (1871); Myall v. Boston &c. R. Co. 19 N. H. 122 (1848); Rixford v. Smith 52 N. H. 355 (1872).

[98] 8 N. J. (Law) 255.

by a carrier by water that he would carry for one-third less than the customary price but would "not be answerable for any loss in the transportation of any freights," the jury having found that his vessel was not in good order. In *Ashmore v. Pennsylvania Steam Towing Company*,[99] it was ruled that a contract lessening a carriers responsibility ought not to be construed to include his own or his servants' negligence. In *Kinney v. Central Railroad Company*,[100] a contract that in consideration of a free passage, a passenger would assume all risk of injury to his person from the negligence of the servants of a railroad company was held valid.

§ 55. *New York.*—It was at first held in New York that a common carrier could not restrict his liabilities by any contract in any respect,[101] but that doctrine was soon overruled,[102] and now, after some fluctuations in the decisions caused by the refusal of a few judges to assent to a rule so unjust and indefensible,[103] it is the settled law in that State that carriers may by special contract exempt themselves from liability for losses arising from any degree of carelessness and negligence on the part of their servants and agents[104] and even, it is said, for their faults and wilful and

[99] 28 N. J. (Law) 180 (1860).

[100] 34 N. J. (Law) 513 (1869); 32 Id. 407 (1868).

See also Tuckerman v. Stephens &c. Trans. Co. 32 N. J. (Law) 321 (1867); New Brunswick Steam Navigation Co. v. Tiers, 24 N. J. (Law) 697 (1853).

[101] Gould v. Hill, 2 Hill 623 (1842). In Alexander v. Greene, 3 Hill, 20 (1842), Bronson, J., expressed a doubt whether a common carrier could limit his common law liability by contract; but the case did not call for a decision on that point. The case of Gould v. Hill, had not then been decided.

[102] Parsons v. Monteath, 13 Barb. 353 (1851); Moore v. Evans, 14 Barb. 524 (1852).

[103] See Parsons v. Monteath, 13 Barb. 353 (1851); Dorr v. New Jersey Steam Nav. Co., 4 Sandf. 136 (1850); Alexander v. Greene, 7 Hill, 533 (1844); Wells v. Steam Nav. Co., 8 N. Y. 375 (1853); Magnin v. Dinsmore, 3 J. & S. (N. Y.) 182 (1873); 6 Id. 284 (1874); Heineman v. Grand Trunk R. Co., 31 How. Pr. 430 (1866); Keeney v. Grand Trunk R. Co. 59 Barb. 104 (1870); all of which cases have been modified or overruled.

[104] Westcott v. Fargo, 63 Barb. 349, *s. c.*, 6 Lans. 319 (1872); West-

criminal acts.[105] But such a contract can only be evidenced by plain and unmistakable language.[106]

But the New York courts recognize nothing but a contract; a common carrier can not screen himself by notice whether brought home to the owner or not. Notice is no evidence of assent on the part of the owner, and he has a right to repose on the common-law liability of the carrier, who can not relieve himself from such liability by any act of his own.[107]

cott v. Fargo, 61 N. Y. 542 (1875); Lee v. Marsh, 28 How. Pr. 275, *s. c.*, 43 Barb. 102 (1864); Meyer v. Harnden's Express Co. 24 How. Pr. 290 (1862); Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115 (1850); Cragin v. N. Y. &c. R. Co. 51 N. Y. 61 (1872); Condict v. Grand Trunk R. Co. 54 N. Y. 500 (1873); Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1872); Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862); Perkins v. New York Cent. R. Co. 24 N. Y. 196 (1862); Wells v. New York Cent. R. Co. 24 N. Y. 181 (1862); Mynard v. Syracuse &c. R. Co., 71 N. Y. 180 (1877); Steinweg v. Erie R. Co., 43 N. Y. 123 (1870); Boswell v. Hudson River R. Co., 5 Bosw. 699, *s. c.* 10 Abb. Pr. 442 (1860); French v. Buffalo &c. R. Co. 4 Keyes, 108, *s. c.* 2 Abb. App. Dec. 196 (1868); Prentice v. Decker, 49 Barb. 21 (1867); Limburger v. Westcott, 49 Barb. 283 (1867); Sunderland v. Westcott, 2 Sweeny, 260 (1870); Smith v. New York Cent. R. Co. 29 Barb. 132 (1859); affirmed 24 N. Y. 222 (1862); Guillaume v. Hamburg &c. Packet Co. 42 N. Y. 212 (1870); Nelson v. Hudson River R. Co. 48 N. Y. 498 (1872); Nicholas v. New York Cent. &c. R. Co., 4 Hun, 327 (1875).

[105] Knell v. United States &c. Steamship Co. 33 N. Y. (Supr. Ct.) 423 (1871). In this case it is suggested that a corporation can not contract for exemption from responsibility for the negligence or misconduct of its board of directors.

[106] Condict v. Grand Trunk R. Co. 54 N. Y. 500 (1873); Lamb v. Camden &c. R. Co. 46 N. Y. 271 (1872); Lamb v. Camden &c. R. Co. 2 Daly, 454 (1869); Knell v. United States &c. Steamship Co. 23 N. Y. (Supr. Ct.) 423 (1871); French v. Buffalo &c. R. Co. 4 Keyes, 108, *s. c.* 2 Abb. App. Dec. 196 (1868): Smith v. New York Cent. R. Co. 29 Barb. 132 (1859); affirmed, 24 N. Y. 222 (1862); Stoddard v. Long Island R. Co. 5 Sandf. 180 (1851); Edsall v. Camden &c. R. Co. 50 N. Y. 661 (1872); Guillaume v. Hamburg &c. Packet Co. 42 N. Y. 212 (1870); Gleadell v. Thomson, 56 N. Y. 194 (1874); Stedman v. Western Transportation Co. 48 Barb. 97 (1866).

[107] Hollister v. Nowlen, 19 Wend. 234 (1838); Cole v. Goodwin, 19 Wend. 251 (1838); followed in Camden &c. Trans. Co. v. Belknap, 21 Wend. 354 (1839); see also Clark v. Faxton, 26 Wend. 153 (1839); Powell v. Myers, 26 Id. 591 (1841); Alexander v. Greene, 3 Hill, 9; 7 Id. 533;

§ 56. *North Carolina*—In this State it is held that a limited liability may be contracted for except for negli-

Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485 (1854); Westcott v. Fargo, 63 Barb. 349, *s. c.*, 6 Lans 319 (1872); Blossom v. Dodd, 43 N. Y. 264 (1870); Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115 (1850); Nevins v. Bay State Steamboat Co., 4 Bosw. 225 (1859); Prentice v. Decker, 49 Barb. 21 (1867); Limburger v. Westcott, 49 Barb. 283 (1867); Sunderland v. Westcott, 2 Sweeny, 260 (1870); Slocum v. Fairchild, 7 Hill, 292 (1843); Madan v. Sherard, 10 J. & S. 353 (1877), affirmed, 73 N. Y. 330 (1878); Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 229 (1869); Woodruff v. Sherrard, 9 Hun, 322 (1876): Rawson v. Pennsylvania R. Co. 2 Abb. Pr. (N. S.) 220 (1867), 48 N. Y. 212 (1872).

The other cases in this State on the subject of this treatise are: Arend v. Liverpool &c. Steam. Co., 6 Lans. 459, 64 Barb. 118 (1872); Aymar v. Astor, 6 Cow. 266 (1826); Ætna Ins. Co. v. Wheeler, 49 N. Y. 616 (1872); Breese v. United States Telegraph Co., 48 N. Y. 132 (1871); Bissel v. Campbell, 54 N. Y. 353 (1873); Browning v. Long Island R. Co., 2 Daly, 117 (1867); Bostwick v. Baltimore &c. R. Co. 45 N. Y. 712 (1871); Babcock v. Lake Shore &c. Co., 49 N. Y. 491 (1872); Belger v. Dinsmore, 51 N. Y. 166 (1872); Blossom v. Griffin, 13 N. Y. 569 (1856); Cochran v. Dinsmore, 49 N. Y. 249 (1872); Coffin v. New York Cent. R. Co., 64 Barb. 379 (1872); Collins v. Burns, 36 N. Y. (S. C.) 518 (1873); Collins v. Burns, 63 N. Y. 1 (1875); Collender v. Dinsmore, 64 Barb. 457 (1873); Collender v. Dinsmore, 55 N. Y. 200 (1873); Elliott v. Rossell, 10 Johns. 1 (1813); Fairchild v. Slocum, 19 Wend. 329 (1838); Fairchild v. Slocum, 7 Hill 292 (1843); Fibel v. Livingston, 64 Barb. 179 (1872); Falkenau v. Fargo, 35 N. Y. (S. C.) 332, *s. c.* 44 How Pr. 325 (1872); First National Bk. v. Shaw, 61 N. Y. 283 (1874); Freeman v. Newton, 3 E. D. Smith, 246 (1854); Gibson v. American Merchants Ex. Co., 1 Hun, 387 (1874); Germania Fire Ins. Co. v. Memphis &c. R. Co., 72 N. Y. 90 (1878); Goddard v. Mallory, 52 Barb. 87 (1868); Goodrich v. Thompson, 4 Robt. 75 (1866); Goodrich v. Thompson, 44 N. Y. 324 (1871); Hill v. Syracuse &c R. Co., 8 Hun. 296 (1876); Hill v. Syracuse &c. R. Co. 73 N. Y. 351 (1878); Heineman v. Grand Trunk R. Co., 31 How. Pr. 430 (1866); Hinkley v. New York Cent. &c. R. Co., 3 Thomp. & C. 281 (1874); Hinckley v. New York Cent. &c. R. Co., 56 N. Y. 429 (1874); Harmony v. Bingham, 1 Duer, 209 (1852); Harmony v. Bingham, 12 N. Y. 99 (1854); Hersfield v. Adams, 19 Barb. 577 (1855); Holford v. Adams, 2 Duer, 471 (1853); Johnson v. New York Cent. R. Co., 31 Barb. 196 (1857); Johnson v. New York Cent. R. Co., 33 N. Y. 610 (1865); Kirkland v. Dinsmore, 4 Thomp. & C. 304 (1874); Kirkland v. Dinsmore, 62 N. Y. 171 (1875); Lamb v. Camden, &c. R. Co., 4 Daly, 483 (1873); Long v. New York Cent. R. Co., 50 N. Y. 76 (1872); Landsberg v. Dinsmore, 4 Daly, 490 (1873); Meyer v. Peck, 28 N. Y. 590 (1864); Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871); Moriarty v. Harnden's Ex. 1 Daly, 227 (1862); Manhattan Oil Co. v. Camden &c. R.

gence.[108] Although common carriers can not, by a general notice of "all baggage at owner's risk," free themselves from liability, they may, by special notice brought to the knowledge of the owner, reasonably qualify their liability for loss of brittle, perishable or unusually valuable articles.[109]

§ 57. *Ohio.*—In 1857,[110] GHOLSON, J., referring to a case decided in this State in 1840,[111] in which it was held that a

Co., 34 N. Y. 197 (1873); 5 Abb. (N. S.) 289 (1868); Magnin v. Dinsmore, 62 N. Y. 35 (1875); Magnin v. Dinsmore, 3 J. & S. 182 (1873); Magnin v. Dinsmore, 6 J. & S. 248 (1874); Magnin v. Dinsmore, 53 N. Y. 652 (1873); Magnin v. Dinsmore, 70 N. Y. 410 (1877); Mynard v. Syracuse &c. R. Co., 7 Hun., 399 (1876); Mercantile Ins. Co. v. Calebs, 20 N. Y. 173 (1859); McArthur v. Sears, 21 Wend. 190 (1839); Newstadt v. Adams, 5 Duer, 43 (1855); Orange County Bank v. Brown, 9 Wend. 85 (1832); Price v. Hartshorn, 44 Barb. 655 (1865): Price v. Powell, 3 N. Y. 322 (1850); Penn v. Buffalo &c. R. Co., 49 N. Y. 204 (1872); Place v. Union Express Co., 2 Hilt. 19 (1858); Phelps v. Williamson, 5 Sandf. 578 (1852); Quimby v. Vanderbilt, 17 N. Y. 306 (1858); Rawson v. Holland, 59 N. Y. 611 (1875); Redpath v. Vaughan, 52 Barb. 489 (1868); Redpath v. Vaughan, 48 N. Y. 655 (1871); Ricketts v. Baltimore &c. R. Co., 61 Barb. 18 (1871); Read v. Spaulding, 5 Bosw. 395 (1859); Reed v. United States Ex. Co. 48 N. Y. 462 (1872); Schieffelin v. Harvey, 6 Johns. 170, Anth. 56 (1810); Steers v. Liverpool &c. Steam. Co., 57 N. Y. 1 (1874); Sweet v. Barney, 23 N. Y. 335 (1861); Stinson v. New York Cent. R. Co., 32 N. Y. 333 (1865); Spinette v. Atlas Steamship Co., 14 Hun, 100 (1878); Shelton v. Merchants Dispatch Co., 36 N. Y. (S. C.) 527 (1873); Shelton v. Merchants Dispatch Co., 59 N. Y. 258 (1874); Soumet v. National Express Co., 66 Barb. 284 (1873); Sherman v. Hudson &c. R. Co., 64 N. Y. 254 (1876); Simmons v. Law, 8 Bosw. 213 (1861); Simmons v. Law, 3 Keyes, 217 (1866); Tysen v. Moore, 56 Barb. 442 (1870); Tierney v. New York Cent. R. Co., 10 Hun. 569 (1877); Vrooman v. American &c. Express Co., 5 N. Y. (S. C.) 22, 2 Hun. 512 (1874); Van Winkle v. Adams Express Co., 3 Robt. 59 (1864); White v. Van Kirk, 25 Barb. 16 (1856); Wolfe v. Myers, 3 Sandf. 7 (1849); Wetzell v. Dinsmore, 54 N. Y. 496 (1873); Wooden v. Austin, 51 Barb. 9 (1866); Witbeck v. Holland, 55 Barb. 443 (1870); Young v. Western Union Telegraph Co. 34 N. Y. (S. C.) 390 (1872); Zung v. Howland, 5 Daly, 136 (1874).

[108] Lee v. Raleigh &c. R. Co., 72 N. C. 236 (1875).

[109] Smith v. North Carolina R. Co., 64 N. C. 235 (1870); Williams v. Branson, 1 Murphey, 417 (1810).

See also, Harvy v. Pike, N. C. Term. Rep. 82, *s. c.* 7 Am. Dec. 698 (1817); Capehart v. Seaboard &c. R. Co. 77 N. C. 355 (1877).

[110] Union Mutual Ins. Co. v. Indianapolis &c. R. Co., 1 Disney, 480.

[111] Jones v. Voorhees, 10 Ohio, 145.

proprietor of a stage coach could not limit his liability for the baggage of a passenger by a notice that it was carried at his own risk, doubted whether the law of Ohio would permit a common carrier to restrict his liability either by a notice or a special agreement. But in *Davidson v. Graham*, decided four years earlier,[112] the doctrine, now the well settled law of this State, had been announced, that a common carrier can not restrict his liability by notice, verbal, written or printed, even when brought to the knowledge of the owner or employer, and that although he may by contract restrict his liability as an insurer, he can not stipulate for a less degree of care and diligence in the discharge of his duty than that which pertains to his peculiar trust as a bailee.[113]

§ 58. *Oregon.*—There are no cases in point in this State.

§ 59. *Pennsylvania.*— All the cases in this State agree that a common carrier can not contract for exemption from the consequences of his own or his agents' negligence.[114] In Pennsylvania a carrier may limit his liability by a clear

[112] 2 Ohio St. 131 (1853).

[113] Followed in Graham v. Davis, 4 Ohio St. 362 (1854); Welsh v. Pittsburg &c. R. Co., 10 Ohio St. 65 (1859); Cleveland &c. R. Co. v. Curran, 19 Ohio St. 1 (1869); Cincinnati &c. R. Co. v. Pontius, Id. 221 (1869); Knowlton v. Erie R. Co. Id. 260 (1869); United States Express Co. v. Bachman, 2 Cin. 251 (1872); affirmed, 28 Ohio St. 144 (1875); Erie R. Co. v. Lockwood, 28 Ohio St. 358 (1876); Gaines v. Union Transportation Co. Id. 418 (1876); Union Express Co. v. Graham, 26 Ohio St. 595 (1875).

The remaining cases in Ohio are: Childs v. Little Miami R. Co., 1 Cin. 480 (1871); Lawrence v. McGregor, Wright, 193 (1833); May v. Babcock, 4 Ohio, 334 (1829); Muller v. Cincinnati &c. R. Co., 2 Cin. 280 (1872); Fatman v. Cincinnati &c. R. Co., 2 Disney, 248 (1858); Wayne v. The General Pike, 16 Ohio, 421 (1847); Davis v. Western Union Telegraph Co., 1 Cin. 100 (1870); McGregor v. Kilgore, 6 Ohio, 358 (1834).

[114] Beckman v. Shouse, 5 Rawle, 179 (1835); Atwood v. Reliance Trans. Co., 9 Watts, 87 (1839); Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67 (1851); Pennsylvania R. Co. v. Butler, 57 Pa. St. 335 (1868); Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315 (1865); Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526 (1854); Goldey v. Pennsylvania R. Co., 30 Pa. St. 242 (1858); Empire Transportation Co. v. Wamsutta &c. Oil Co., 63 Pa. St. 14 (1869); American Express Co. v. Sands, 55 Pa. St. 140 (1867);

and explicit general notice brought home to the employer.[115] This doctrine seems to be well established here. In *Laing v. Colder*,[116] BELL, J., says: "The expediency of recognizing in him [the carrier] a right to do so by general notice, such as was given here, has been strongly and justly questioned, and in some of our sister States altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom in the vast majority of cases he can not but choose to employ." The person with whom the carrier deals must be fully informed of its terms and its effect. The exception goes on the ground of a contract, express or implied. Where the notice was in the English language, and the passenger was a German who did not understand English, it was held to be incumbent on the carrier to prove that the passenger had knowledge of the limitation; and that if tickets, without anything more, are evidence of a special contract, yet they must be printed in a language which the passenger understands, or their terms must be explained to him.[117]

Adams Express Co. v. Sharpless, 77 Pa. St. 516 (1875); American Express Co. v. Second National Bank, 69 Pa. St. 394 (1871); Farnham v. Camden &c. R. Co., 55 Pa. St. 53 (1867); Lucesco Oil Co. v. Pennsylvania R. Co., 2 Pitts. 477; Powell v. Pennsylvania R. Co., 32 Pa. St. 414 (1859); Ritz v. Pennsylvania R. Co. 3 Phila. 82 (1858); Gordon v. Little, 8 S. & R. 533 (1822)

[115] Beckman v. Shouse, 5 Rawle, 179 (1835); Laing v. Colder, 8 Pa. St. 479 (1848); Bingham v. Rogers, 6 W. & S. 495 (1843); Verner v. Sweitzer, 32 Pa. St. 208 (1858); Pennsylvania R. Co. v. Schwarzenberger, 45 Pa. St. 208 (1863); Farnham v. Camden &c. R. Co., 55 Pa. St. 53 (1867). A contrary view is said to be taken in Vanderslice v. The Superior, 9 Pa. L. J. 116, a case which I have not been able to consult.

[116] 8 Pa. St. 479 (1848).

[117] Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67 (1851).

The remaining cases in this State on the subjects here treated of are: Delaware &c. Tow Boat Co. v. Starrs, 69 Pa. St. 36 (1871); Baltimore &c. Steamboat Co. v. Brown, 54 Pa. St. 77 (1867); Hand v. Baynes, 4 Whart. 204 (1838); Forbes v. Dallett, 9 Phila. 515 (1872); Clyde v. Graver, 54 Pa. St. 251 (1867); Coxe v. Heisley, 19 Pa. St. 243 (1852); Hays v. Kennedy, 41 Pa. St. 378 (1861); Hays v. Millar, 77 Pa. St. 238 (1874);

§ 60. *Rhode Island.*—In Rhode Island the questions discussed in this chapter have not arisen for determination by the courts.[118]

§ 61. *South Carolina.*—A common carrier may limit his liability by express contract,[119] and also, it would seem, by notice.[120] But in neither case for negligence.[121]

§ 62. *Tennessee.*—A carrier may restrict his common law liability by contract except for negligence.[122] But not by a general notice.[123]

Brown v. Camden &c. R. Co., 83 Pa. St. 316 (1877); Shenk v. Philadelphia Propeller Co., 60 Pa. St. 109 (1869); Wolf v. Western Union Telegraph Co., 62 Pa. St. 83 (1869); Camden &c. R. Co. v. Forsyth, 61 Pa. St. 81 (1869); Bell v. Reed, 4 Binney, 127 (1810); Hart v. Allen, 2 Watts, 114 (1833); Newburger v. Express Co., 6 Phila. 174 (1866); Chouteaux v. Leech, 18 Pa. St. 224 (1852); Whitesides v. Russell, 8 W. & S. 44 (1844); Weir v. Express Co., 5 Phila. 355 (1864); Harrington v. McShane, 2 Watts, 443 (1834); Morrison v. Davis, 20 Pa. St. 171 (1852); Gales v. Hailman, 11 Pa. St. 515 (1849); Warden v. Greer, 6 Watts, 424 (1837); Colton v. Cleveland &c. R. Co., 67 Pa. St. 211 (1870); Humphreys v. Reed, 6 Whart. 435 (1841); Patterson v. Clyde, 67 Pa. St. 500 (1871).

[118] Hubbard v. Harnden Express Co., 10 R. I. 244 (1872), is the only Rhode Island case anywhere in point.

[119] Porter v. Southern Express Co., 4 S. C. 135 (1872); Levy v. Southern Express Co., 4 S. C. 234 (1872); Swindler v. Hilliard, 2 Rich. (S. C.) 201 (1856); Baker v. Brinson. 9 Rich. (S. C.) 201 (1856); Patton v. Magrath, Dudl. 159 (1838); Singleton v. Hilliard, 1 Strobh. 203 (1847).

[120] Levy v. Southern Express Co., 4 S. C. 234 (1872); Patton v. Magrath, Dudl. 159 (1838).

[121] Swindler v. Hilliard, 2 Rich. (S. C.) 216 (1846); Parker v. Brinson, 9 Rich. (S. C.) 201 (1856).

The other cases are: Hammond v. McClure, 1 Bay. 99 (1790); Gaither v. Barnet, 2 Brev. 488 (1811); Marsh v. Blyth, 1 N. & Mc. 170 (1818); Marsh v. Blythe, 1 McCord, 360 (1821); Cameron v. Rich, 4 Strobh. 168 (1850), *s. c.*, 5 Rich. (S. C.) 352 (1852); Stadhecker v. Combs, 9 Rich. (S. C.) 193 (1856); Steamboat Co. v. Bason, Harp. 262 (1824); Reaves v. Waterman, 2 Speers, 197 (1843).

[122] Olwell v. Adams Express Co., 1 Cent. L. J. 186 (1874); Craig v. Childress, Peck, 270 (1823); Nashville &c. R. Co. v. Jackson, 6 Heisk. 271 (1871); Southern Express Co. v. Womack, 1 Heisk. 256 (1870); East Tennessee &c. R. Co. v. Nelson, 1 Cold. 272 (1860).

[123] Walker v. Skipwith, Meigs, 502 (1838).

The other cases are: Memphis &c. R. Co. v. Jones, 2 Head, 517 (1859); Gordon v. Buchanan, 5 Yerg. 71 (1833); Turney v. Wilson, 7 Yerg. 340

§ 63. *Texas.*—By a statute of this State passed in 1860, it is provided, "that railroad companies and other common carriers of goods, wares and merchandise for hire, within this State on land or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, nor by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, nor in any other manner whatever, and no special agreement, made in contravention of the foregoing provisions of this section shall be valid."[124] A previous statute which this repealed was directed against notices general or actual, but permitted a special agreement in writing signed by the parties or their agents.[125]

§ 64. *Vermont.*—The liability of the carrier may be restricted by contract; but not by general notice, unless clearly proved to have been assented to by the employer.[126]

§ 65. *Virginia.*—A common carrier may by contract restrict his common law liability, except for negligence.[127]

§ 66. *West Virginia.*—In West Virginia a common carrier may, by contract, absolve himself from all liability resulting from any and every degree of negligence short of fraud, provided the contract is clear that such was the in-

(1835); Jones v. Walker, 5 Yerg. 427 (1827); Johnson v. Friar, 4 Yerg. 48 (1833).

[124] Paschal's Digest, art. 4253.

[125] Id., note 329.

See Fowler v. Davenport, 21 Tex. 626 (1858); Austin v. Talk, 20 Tex. 164 (1857); Cantu v. Bennett, 39 Tex. 303 (1873).

[126] Farmers &c. Bank v. Champlain Trans. Co., 18 Vt. 131 (1846), *s. c.*, 23 Vt. 186 (1851); Mann v. Birchard, 40 Vt. 326 (1867); Blumenthal v. Brainerd, 38 Vt. 402 (1866); Kimball v. Rutland &c. R. Co., 26 Vt. 247 (1854).

The other cases are: Spencer v. Daggett, 2 Vt. 92 (1829); King v. Woodbridge, 34 Vt. 565 (1861); Mann v. Birchard, 40 Vt. 326 (1867); Newell v. Smith, 49 Vt. 255 (1877); Cutts v. Brainerd, 42 Vt. 566 (1870).

[127] Wilson v. Chesapeake &c. R. Co., 21 Gratt. 654 (1872); Virginia &c. R. Co. v. Sayers, 26 Gratt. 328 (1875).

See also Friend v. Woods, 6 Gratt. 189 (1849).

tention of the parties to it.[128]

§ 67. *Wisconsin*—The question of the power of a carrier to restrict his liability by an exception in a bill of lading or by a special contract, was first raised in this State in 1856.[129] But the Supreme Court then evaded the point, as it did again in 1862,[130] and again in 1865.[131] In *Boorman v. American Express Company*,[132] decided one year later, it was held that an express company may lawfully limit its liability as insurer by contract, as to losses arising through the default or negligence of any other person, corporation or association to whom the property intrusted to it shall be delivered by the company for the performance of any act or duty in respect thereto, at any point or place off the established routes or lines of the company, and may free itself from liability for any loss or damage of any box or package for over $50, unless the just and true value is stated in the receipt; or for property not properly packed, or fragile fabrics not so marked upon the package, or fabrics consisting of or contained in glass. "The conditions of this receipt," said the court, "do not involve the much vexed question as to whether a common carrier can protect himself by contract from liability for losses occurring through his own negligence or misconduct, or the negligence or misconduct of his own agents or servants." In the same year a contract that the owner of *live stock* would assume all risk of damage or injury from whatever cause happening in the course of transportation was held to be valid. But the chief justice was careful to add: "We intimate no opinion as to whether it is or is not competent for a common carrier to make similar stipulations with regard to other kinds of property, or so as to protect himself against loss or damage arising from his own negligence or the neg-

[128] Baltimore &c. R. Co. v. Rathbone, 1 W. Va. 87 (1865); Baltimore &c. R. Co. v. Skeels, 3 W. Va. 556 (1869).

[129] The Sultana v. Chapman, 5 Wis. 454.

[130] Falvey v. Northern Transportation Co., 15 Wis. 129.

[131] Detroit &c. R. Co. v. Farmers Bank, 20 Wis. 122.

[132] 21 Wis. 152 (1866).

ligence or omissions of his agents or servants.[133] This question, therefore, remains still an open one in this State.

[133] Betts v. Farmers Loan &c. Co., 21 Wis. 80 (1866).

The other cases in this State are: Strohn v. Detroit &c. R. Co., 21 Wis. 554 (1867); Peet v. Chicago &c. R. Co., 19 Wis. 118 (1865); Wahl v. Holt, 26 Wis. 703 (1870); Hooper v. Chicago &c. R. Co., 27 Wis. 81 (1870); Glass v. Goldsmith, 22 Wis. 488 (1868); Gleason v. Goodrich Trans. Co., 32 Wis. 85 (1873); Martin v. American Express Co., 19 Wis. 336 (1865).

CHAPTER III.

POLICY OF ALLOWING A LIMITED LIABILITY.

SECTION.

68. Policy of Allowing Common Carriers to Limit their Liability by Contract.
69. Relation of Carrier to Customer.
70. Views of the Judges — The American Doctrine.
71. Remarks of Garrow, B., in Bodenham v. Bennett.
72. Strict Views of Nisbet, J., in Fish v. Chapman.
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74. Elaborate Judgment of Mr. Justice Bradley in Railroad Company v. Lockwood.
75. Similar Views Expressed by Individual Judges in New York.
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77. Impressions of Welles, J., in Parsons v. Monteath.
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79. And of Woodruff, J., in French v. Buffalo &c. Railroad Company.
80. Opinion of Parker, J., in Dorr v. New Jersey Steam Navigation Company.
81. Of Gould, J., in Wells v. New York Central Railroad Company.
82. Of Allen, J., in Smith v. New York Central Railroad Company.
83. Of Smith, J., in Perkins v. New York Central Railroad Company.
84. And of Selden, C. J., in the same case.

§ 68. *Policy of Allowing Common Carriers to Limit their Liability by Contract.*—Whether common carriers should be permitted to restrict their liabilities by agreement is a question about which there has been a great difference of opinion. We have seen that in England at an early day such contracts were spoken of as being against public policy; that about the close of the last and the beginning

of the present century, the ancient rule became much relaxed, carriers being allowed to dictate the terms on which they would receive goods for carriage; that the evil effects of this rule incurred the disfavor and called forth the protests of the common law judges, and that parliament interfered, bringing back the boundaries of the law to something like its old landmarks. In America no such confusion has arisen. As was shown in the previous chapter, the doctrine in this country while allowing the carrier to rid himself of the liabilities of an insurer, will not permit him to escape the duties of a bailee. The American courts have not yet been compelled to enforce and at the same time to lament the law, but have, with but one exception, declared that a common carrier shall not be excused for a lack of that care and diligence which the law demands of him, by a contract which he may have induced his customer to approve.

§ 69. *Relation of Carrier to Customer.*—This rule has its foundation on the relation which the carrier and the bailor hold to each other, and the danger of fraud, actual or constructive. "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore, are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*."[1] The courts, therefore, have been called upon to consider whether by reason of the peculiar position which a common carrier occupies towards the public, he has not such a preponderating advantage as should place his employers under a certain disability as to their contracts made with him. It may be said that commerce flourishes best when it is left most untrammeled; but it may also be urged that it is not to the

[1] Story Eq. Jur., sec. 258.

interest of commerce that a common carrier shall be able to lay an embargo on trade at any time, by refusing to transport goods unless under such restrictions of his liability as would hinder reasonable men from giving him employment. It is very true that a common carrier can not compel his customer to enter into a contract relieving him of his common law duties. The former has the right to insist on the carriage of the goods under the common law rules; and if the carrier refuse thus to receive them, he is liable to an action. But this remedy, besides being vexatious and tedious, is one that may have to be applied in every case where the issue is made between the carrier and an employer; and it may well be supposed that in this kind of a contest the carrier, in the long run, would be able to set the public somewhat at defiance, as but few persons would be disposed to follow up a litigation which would be for the benefit of the public, but which must be prosecuted at their own costs and inconvenience. In most kinds of business a salutary influence in securing services under conditions that are not oppressive, is brought about by private competition. But in the case of many of the railroads now doing the greater part of the carrying business of the country, competition can hardly be said to exist; and where it would seem to exist, it is commonly stifled by extensive combinations between rival carriers. In the infancy of the carrying business of England it was thought to be necessary to prescribe rigid rules for the liability of common carriers, lest they might be tempted to collude with robbers who then infested the country. This reason for these rules can not fairly be said any longer to exist. But the opportunity of the carrier to violate his duties may at present be taken advantage of in many ways. The difficulty of fixing him with proof of intentional injury is as great as ever; and the necessity of resorting to his services, and the importance of a proper performance of his functions, have been immensely enhanced.

§ 70. *Views of the Judges—The American Doctrine.—*

As the question under consideration is one that is pertinent not only to any inquiry as to what the law ought to be, which is foreign to the object of this treatise, but also directly affects the construction of contracts limiting the liabilities of common carriers—since contracts that are favored in law and contracts that are odious are interpreted liberally or strictly as the case may be—we deem it proper to give the views of the judges in support of the American doctrine in the language used by them; and to follow this with the arguments of the New York judges in defense of the exceptional rule which they have adopted.[2]

§ 71. *Remarks of Garrow, B., in Bodenham v. Bennett.* —"Everybody who has had anything to do with carriers must know that if this case had received a contrary decision, they would have no security whatever. The carriers would have said: 'You may enter into my lottery of a common carrier where there are a hundred blanks to a prize—where it is a hundred to one if your parcel arrives

[2] In addition to the views of the judges which are given in this chapter, the reader is referred, for lack of space to set them out in full, to the opinions of Mr. Justice Strong in Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 4 Cent. L. J., 35 (1876); of Parke, B., in Carr v. Lancashire &c. R. Co., 7 Exch. 712, 7 Railw. Cas. 426 (1852); of Smith, J., in Welles v. New York Cent. R. Co., 26 Barb. 641 (1858); of Robertson, J., in Adams Express Co. v. Nock, 2 Duv. (Ky.) 562 (1866); of Thatcher, C. J., in Merchants Dispatch Co. v. Cornforth, 3 Col. 280 (1877); of Mr. Justice Strong in York Co. v. Central Railroad, 3 Wall. 107 (1865); of Thompson, J., in Farnham v. Camden &c., R. Co., 55 Pa. St. 53 (1867); of Cockburn, C. J., in Phillips v. Clark, 2 C. B., N. S., 156 (1857); of Foster, J., in Welch v. Boston &c. R. Co., 41 Conn. 333 (1874); of Evans, J., in Swindler v. Hilliard, 2 Rich. 216 (1846); of Christian, J., in Virginia, &c. R. Co. v. Sayers, 26 Gratt. 328 (1875); of Wyly, J., in Higgins v. New Orleans &c. R. Co., 28 La. Ann. 133 (1876); of Martin, C. J., in Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859); of Gibson, C. J., in Atwood v. Reliance Co. 9 Watts, 87 (1839); of Ranney, J., in Graham v. Davis, 4 Ohio St. 362 (1854); of Bartley, J., in Davidson v. Graham, 2 Ohio St. 131 (1853); of Beasley, C. J., in Kinney v. Central R. Co. 32 N. J. (Law) 407 (1868); of Perley, J., in Moses v. Boston &c. R. Co., 24 N. H. 71 (1851); of Berry, J., in Jackson v. St. Paul &c. R. Co., 20 Minn. 125, 1 Cent. L. J. 375 (1873); of Denio, C. J., in Bissell v. New York Cent. R. Co., 25 N. Y. 448 (1862).

safe.' But this case will teach them that it is their interest to employ persons capable of attending to their duty." [3]

§ 72. *Strict Views of Nisbet, J., in Fish v. Chapman.* "The carrier is recognized as a public agent; for his services he is entitled to ample reward, and is not bound to perform them unless it is paid or tendered; *ex necessitate rei*, the most unqualified confidence is reposed in him; this confidence is indispensable to the exercise of his vocation. From the nature of his calling, the utmost facilities are at his control for fraudulent conduct and collusive combinations; and for the same reason his frauds or combinations are difficult of proof. He enters into this line of business voluntarily and with a knowledge of all its hazards, for he is justly presumed to know the laws of the land. The law, then, looking to the great interests of commerce, and guarding with parental care the rights of the greatest number, makes him an insurer of the property delivered to him. With what resistless force does not this reasoning apply to the ten thousand incorporations of our own country? Strong in associated wealth; strong in the mind which is usually enlisted in their management; and yet stronger, far stronger, in the large immunities and extraordinary privileges with which their charters invest them. If these, as carriers, can vary their liability at all, at what limit does the power stop? where are its boundaries? Outside of the obligations which their charters impose, there would be neither bounds nor limitations; the citizens would be at their mercy, bound by their power and subject to their caprices." [4]

§ 73. *Opinion of Worden C. J., in Michigan Southern Railroad Company v. Heaton.*— "A common carrier, and especially one exercising and enjoying corporate franchises granted, as is supposed, for a public purpose and for the public benefit, can not, in our opinion, be permitted to so far disregard the duty which he or it owes to the public, as

[3] Bodenham v. Bennett, 4 Price, 31 (1817).
[4] Fish v. Chapman, 2 Ga. 349 (1847).

to stipulate for any degree of negligence in the discharge of duty as such common carrier. It is not simply a question between the carrier and the single individual with whom the contract is made. It is a question of public interest on the one hand and public duty on the other. If such contract can be made and is to be held valid in one instance, it follows that if made in all cases it must be held valid in all cases. The carrier may thus force these terms upon the shipper, who must either accept them or forego the transportation of his goods by means of the common carrier, or resort to his action against the carrier for refusing to transport his goods without such stipulations, which practically would be an inadequate remedy, rather than resort to which, the shipper would generally submit to the carrier's terms. The common carrier may thus divest himself of that character, and force the public through its necessities to intrust the transportation of goods to carriers irresponsible for negligence." [5]

§ 75. *Elaborate Judgment of Mr. Justice Bradley in Railroad Company v. Lockwood.*— The opinion of Mr. Justice BRADLEY, of the Supreme Court of the United States, in *Railroad Company v. Lockwood*,[6] has shed a new lustre upon that distinguished tribunal. The ablest argument on the subject under discussion that the American reports contain, it is destined to fix the law on as firm a basis as was the law of bailments by the case of *Coggs v. Bernard*. Like Lord HOLT'S celebrated judgment it will endure, though unlike Lord HOLT'S celebrated judgment it is unanswerable. "It is contended," says Mr. Justice BRADLEY in this case, "that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions in his absence he can exercise no control. If we advert for a moment to the fundamental principles on which the law of

[5] Michigan &c. R. Co. v. Heaton, 37 Ind. 448 (1871).
[6] 17 Wall. 357 (1874).

common carriers is founded, it will be seen that this objection is inadmissible, In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties, an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment, and to assert that he may do so seems almost a contradiction in terms. Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands; not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive to the very object of the law. It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carrried. Thus in *Dorr v. New Jersey Steam Navigation Company*,[7] the court sums up its judgment

[7] 11 N. Y. 485 (1854).

thus: 'To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.' Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He can not afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough, if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice; if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when

any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. Hence, as before remarked, we regard the English statute, called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge at the trial or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties. Conceding, therefore, that special contracts made by common car-

riers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent for example, of excusing them for all losses happening by accident without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence — an excuse so repugnant to the law of their foundation and to the public good — they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties; the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

§ 75. *Similar Views Expressed by Individual Judges in New York.*—"The fruits of this rule," says DAVIS, J., in *Stinson v. New York Central Railroad Company*,[8] referring to the rule established in New York that carriers may by contract exempt themselves from responsibility for acts of negligence, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." In a dissenting opinion delivered in *Smith v. New York Central Railroad Company*,[9] WRIGHT, J., observed: "Whether a contract shall be avoided on the ground of public policy, does not depend upon the question whether it is beneficial or otherwise to the contracting parties. Their personal interests have nothing to do with it; but the interests of the public are alone to be considered. The State is interested not only in the welfare but in the safety of its citizens. To promote these ends is a leading object of government. Parties are left to make whatever contract they please, provided no legal or moral obligation is thereby violated or any public interest impaired; but when the effect or tendency of the contract is to impair

[8] 32 N. Y. 333 (1865).
[9] 24 N. Y. 222 (1862).

such interest, it is contrary to public policy and void. Contracts in restraint of trade are void, because they interfere with the welfare and convenience of the State; yet the State has a deeper interest in protecting the lives of its citizens. It has manifested this interest unmistakably in respect to those who travel by railroads. Her policy, and the uniform policy of the law, has been, in regard for the safety of the citizen who has recourse to this dangerous mode of travel, upon a road and by agencies over which he has no control, to hold the carrier to the exercise of the utmost foresight even as to possible dangers, and the utmost prudence in guarding against them. This policy is dictated both by a desire to protect the citizen, and because the public is interested in his safety. Whether a carrier to whose exclusive charge the safety of a passenger has been committed, by his own culpable negligence and misconduct shall put in jeopardy the life of such passenger, is a question affecting the public and not the party alone who is being carried. It is said that the passenger should be left to make whatever contract he pleases; but, in my judgment, the public having an interest in his safety, he has no right to absolve a railroad company, to whom he commits his person, from the discharge of those duties which the law has enjoined upon it in regard for the safety of men. Can a contract, then, which allows the carrier to omit all caution or vigilance, and is, in effect, a license to be culpably negligent to the extent of endangering the safety of the passenger, be sustained? I think not. Such a contract, it seems to me, manifestly conflicts with the settled policy of the State in regard to railroad carriage. Its effect, if sustained, would obviously enable the carrier to avoid the duties which the law enjoins in regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier, which is, perhaps, the only one adequate to secure the highest degree of caution and vigilance. A contract with these tendencies, is, I think, contrary to public policy, even when no fare is

paid." In a dissenting opinion in *Wells v. New York Central Railroad Company*,[10] SUTHERLAND, J., took these grounds: "If A request B to beat another and promise to save him harmless, the promise is void. So if A promise, in consideration of twenty shillings paid to him by B, he will pay B forty shillings, if he does not beat G S out of such a a close, the promise is void. These are cases put in the books, and it is said that the contracts are illegal as *contra bonos mores*. It can also be said that such contracts are void as against the policy of the law punishing such breaches of the peace as misdemeanors. If A offer to pay B five dollars to promise that he will not take the law of A if A strikes him, and B take the five dollars and make the promise, and thereupon A strikes B, no one would suggest that B's promise was valid; but would it not be proper to say that the promise is void as against the policy of the law punishing the battery as a crime? Certainly any contract which induces or tends to induce or encourage the commission of any crime can properly be said to be void, as against the policy of law declaring and punishing the crime. After the actual commission of the battery B could abandon or settle his claim for damages as he saw fit, but before the commission of the offense, he could not lawfully agree not to prosecute for such damages without encouraging a public wrong. In advance of the actual commission of the offense, he could not by contract lay aside the protection of the law for his private and individual benefit without interfering with public interests and the policy of the law punishing the battery as a crime, and therefore the maxim *modus et conventio vincunt legem* would not apply. * * * Is it necessary to advert to any other law or consideration than the common law and the statutes punishing negligence as a crime to show that the protection of human life from negligence is a matter of public interest, of public policy? And is it not plain that any contract which may induce or lead or tend to induce or lead to a relaxation of

[10] 24 N. Y. 181 (1682).

the care and attention required by the law as a social duty for the protection of human life, interferes with this public policy and should be held void as against the policy of the laws declaring it? The negligence which caused the injury to the plaintiff, might have caused his death and the death of many others. If the plaintiff had paid full fare and taken the risk of the passage upon himself, his contract would have been void for want of consideration, the defendants being under an admitted obligation to carry all passengers who present themselves on offering to pay the usual fare; but if the contract which the plaintiff did make is held valid, what is to prevent the defendants or any other railroad corporation putting the fare up nominally to the legal limit, and making a bargain with all their passengers who will consent to enter into such an arrangement to reduce their fare one-eighth or one-sixteenth of a cent per mile, in consideration of their taking upon themselves the risk of the passage. The railroad corporation might thus make money by depriving the public of the protection afforded by their legal liability in damages for negligence. If the undertaking of the defendants to carry the plaintiff free, or without the payment of any money, was a sufficient consideration for the plaintiff's contract to take the risk of the passage upon himself, then a reduction of his fare, however small, would have been a sufficient consideration for such contract. It certainly can not be necessary to show that liability in damages for a want of care promotes care, and that an extinction of such liability would tend to promote negligence. We certainly have a right to assume that railroad corporations, like individuals, are influenced by motives of self-interest. * * * But we have, so far, taken only a very limited view of the question of public policy. All laws punishing crimes against the person and against the public health show that the life and health of a citizen is a matter of public interest, of the greatest public consideration. That its citizens constitute the strength and wealth of a State is an elementary principle of political

economy. It certainly can not be said that a man has either a moral or legal right to speculate with his own life; or to make any contract tending to remove the safeguards which the law places around it. It is plain to me from the above general considerations that the extraordinary liability of the defendants in damages for negligence as carriers of passengers was not declared by law, nor is it enforced by law, for the benefit only of the party injured in any particular case; but it was declared and is enforced for the benefit of the public also; and therefore a passenger can not by contract in advance of the injury lay aside even his individual benefit from the law or rule of liability. The maxim *quilibet potest renunciare juri pro se introducto*, does not apply in such a case. Public considerations and the policy of the rule or liability itself, forbid that it should."

§ 76. *Opinions Favoring the Opposite View.* — On the other hand opinions have been expressed, always by the courts of New York, however, favoring the exemption of the carrier by contract from all responsibility whatever. They are given in the remaining sections of this chapter, as containing all the arguments which this oppressive doctrine can present.

§ 77. *Impressions of Welles, J., in Parsons v. Monteath.* —"If I have goods to transport, and the common carrier tells me he will carry them for a particular price, without incurring the risk of loss or damage by inevitable accident, but that if he takes such risks, he must add a per centage to the price of transportation, I really can not see what the public have to do with our negotiations, nor why we should not be permitted to make a valid contract, with such conditions and stipulations as we choose.[11]

§ 78. *Views of Wright, J., in Moore v. Evans.*— "I am unable to appreciate those overwhelming considerations of public policy which demand that because an individual is usually engaged in the employment of a carrier, he should have the common law liabilities fixed on him in all cases,

[11] Parsons v. Monteath, 13 Barb. 353 (1851).

even though the owner of the goods be willing to contract specially with him as a private person." [12]

§ 79. *And of Woodruff, J., in French v. Buffalo &c. Railroad Company.*—"A party may certainly consent to place the instruments and agencies which he is employing in his business at the service *pro hac vice* of another, undertaking to set them in motion under the scheme or plan of management which he has established, and say: 'You shall have the benefit of my enterprise, my machinery, my servants, my rules, my regulations and scheme of administration; but I propose that you shall take the hazards of everything but my own fraud or gross negligence, and regard me in no respect insuring or guaranteeing the fidelity or the prudence, diligence or care of those servants, whom I have no reason to distrust, but who may, out of my personal presence, neglect their duty or prove otherwise unfaithful.' There is no sound reason for denying that if a contract is made on those terms, and presumptively for a much less compensation to be paid, it shall not bind the parties. It may safely be assumed that, in this country at least, men of business are shrewd enough to take care of their own interests, and that if a party consents to such a bargain, it is because it is for his interest to do so; he expects to make or save money by relieving the other party from risks which he is willing to assume, and in general his expectation is realized. There is neither honesty nor policy in permitting him, when a loss happens through one of the risks he consented to bear, to deny the binding force of his contract. This is now the practical view of the subject which is recognized as law." [13]

§ 80. *Opinion of Parker, J., in Dorr v. New Jersey Steam Navigation Company.*—"Upon principle it seems to me no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests. No one but the parties can be

[12] Moore v. Evans, 14 Barb. 524 (1852).

[13] French v. Buffalo &c. R. Co., 4 Keyes, 108 (1868).

the losers, and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk upon the carrier. If the owner chooses to relieve him and assume the risk himself, who else has a right to complain? It is supposed that the extent of the risk will be measured by the amount of the compensation, and the latter, it will not be denied, may be regulated by agreement. The right to agree upon the compensation, cannot, without great inconsistency, be separated from the right to define and limit the risk. Parties to such contracts are abundantly competent to contract for themselves. They are among the most shrewd and intelligent men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability where the parties have said nothing on the subject. But if the parties will be better satisfied to deal on different terms, they ought not to be prevented from doing so. It is true a common carrier exercises a *quasi* public employment, and has public duties to perform; that he can not reject a customer at pleasure, or charge any price that he chooses to demand; and that if he refuses to carry goods according to the course of his employment, without a sufficient excuse, he will be liable to an action; and that he can only demand a reasonable compensation for his risk and services; and that an action will lie against him upon a tort arising *ex delicto* for a breach of duty. In such case, there being no special contract, the parties are supposed to have acted with a full knowledge of their legal rights and liabilities, and there may be, perhaps, good reason for the stringent rule of law which makes the carrier an insurer against all except the act of God and the public enemy. But when a special contract is made their relations are changed, and the carrier becomes, as to that transaction, an ordinary bailee and private carrier for hire. This neither changes nor interferes with any established rule of law; it only makes a case to be governed by a different rule. To say the parties have not a right to make their own contract,

and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals or conflicting with the public interest, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."[14]

§ 81. *Views of Gould, J., in Wells v. New York Central Railroad Company.*—"Whether founded on public policy or otherwise, there seems to be nothing illegal in such a contract. It cannot reasonably be said that because five or ten persons on a train that carries two hundred have such passes, there is the less inducement to care on the part of the company or its agents; or that a feeling of indifference to human life would be thereby caused. The *quantum* of interest, the ratio of motive, is too utterly insignificant when compared with the vast liability not protected by any contract and binding the company and its agents to every measure of caution. That agents will be careless; that no considerations are sufficient to induce constant vigilance, we have frequent and terrible proofs. But the holding of such contracts illegal would not even tend to alter the fact."[15]

§ 82. *Of Allen, J., in Smith v. New York Central Railroad Company.*—"The common law, from motives of public policy and for the protection of the public, has made common carriers of property chargeable with all damage to and loss of property in their possession as

[14] Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485 (1854).

[15] Wells v. New York Cent. R. Co., 24 N. Y. 181 (1862). The plaintiff, a passenger on defendant's road, was injured by a collision between the train in which he was riding and a freight train which was carelessly left standing on the track in the night time. He had paid no fare, but was being carried on a free ticket, on which was printed the following condition: "The person accepting this free ticket assumes all risk of accidents, and especially agrees that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." The four previous cases given in §§ 77-80 did not present the question of negligence, and the expressions of the judges in those cases only embrace the restriction of the carrier's liability as an insurer.

carriers, except only where such damage or loss has arisen from inevitable accident, sometimes called the "act of God" or the public enemies. Carriers of persons have for similar reasons been subjected to very stringent liability, and are held to the highest degree of care and skill, and made liable for the slightest neglect. Indeed, so exacting is the law, although founded on the wisest of reasons, that the consequences of the liabilities of this class of public servants are, in extreme cases, almost penal in their nature. But those rules are established and take the place of a special contract, not for the benefit of the public, but for that class of the public who have to do with those classes, and for the protection of those who may suffer by neglect of duty on their part; and unless there is some exception which is to operate in this class of cases which does not affect any other right or duty, or the relations of parties in other situations, the individual for whose benefit the liability exists and the duty is imposed may waive them by agreement. No principle is better settled than that a party to whom any benefit is secured by contract, by statute, or even by the Constitution may waive such benefit, and the public are not interested in protecting him or benefitting him against his wishes. The public have no interest in the question which of the two, A or B, shall take the risk of the seaworthiness of a ship, or the fitness of a railway carriage, or the care and faithfulness of a third person employed in the performance of a duty, in which either or both have an interest, although by certain general rules the law has declared that in the absence of any contract, the risk shall be upon A and not upon B. But if B elects to relieve A, and to assume his risks and liabilities, the public are not at all concerned, and have no occasion to forbid such contracts. If the contract is induced by fraud or duress it is of course void, and the common law liabilities of the parties will remain unchanged. The character of the liability which one contracting party assumes in relief of the other can not affect the validity of the contract, it being wholly personal

to the parties. If one is unwise enough deliberately to excuse another from liability for gross and very gross neglect, there is no good reason why he should not be permitted to do so, even for personal neglect of that character; that is there is no reason why the contracting party should not be estopped from setting up a claim against his express contract not to do so. If the public have any claim against the negligent party, either criminally or otherwise, it will not be affected by the contract, and if the contract be in violation of the law, or for the commission of a criminal offense, neither party can maintain an action against the other upon it or in respect to the transactions to which it relates. Such a contract will not be construed—except its terms compel such construction — as authorizing or contemplating a crime, or as providing against the consequences of a crime, and hence would not ordinarily be held to embrace acts of culpable negligence resulting in death under circumstances that would constitute manslaughter, that is, culpable negligence of that degree in the principal and the contracting party. But the reason does not extend to or prohibit a contract shifting the pecuniary liability of A for the acts of C to B, although such acts of C might be such as would subject him to punishment for manslaughter, for causing death by his culpable negligence, or for any other offense. A man should not be permitted to contract for impunity from his own criminal acts, but there is no reason why he may not contract for such impunity from the acts of his agents, for whom and for whose acts he is only pecuniarily responsible in the nature of a guarantor.[16]

§ 83. *Opinion of Smith, J., in Perkins v. New York Central Railroad Company.*— "What then, did these parties mean by this contract? The parties both well knew

[16] Smith v. New York Cent. R. Co., 24 N. Y. 222 (1862). In the last two sentences the right of a railroad company or other corporation or any person to limit their liability for the criminally negligent acts of their agents is referred to, and is further maintained in a succeeding portion of the opinion, which is omitted here.

that railroad accidents were of frequent occurrence; that railroad travel was subject constantly to perils resulting from the carelessness and negligence of engineers, conductors, baggagemen, brakemen, switchmen and others; that trains were frequently thrown off the track or came in collision, and were subject to a variety of accidents and casualties against which no human prudence or skill in the employment of agents could entirely guard, and that all such accidents involve, unavoidably, more or less loss of life or limb, or bodily injury, and other disastrous consequences. With perfect knowledge of these facts, Mr. Perkins asked for and accepted the free pass upon the express condition that he should assume 'all risk of accidents.' * * * Such is the bargain. * * * * The defendants, in view of the accidents, attended with much pecuniary loss, resulting constantly from the negligence of some of their agents, proposed to carry Mr. Perkins, without charge, to Albany, upon condition that he would take for himself the risks attending the trip. The question between the parties was simply which should take the risk of such accidents as might occur in consequence of some of the defendants' many agents. Without an agreement exempting and absolving them from all liability in respect to such accidents, and the injuries resulting therefrom, the defendants would be legally responsible for such injuries. Mr. Perkins assumes the risk for himself. He becomes his own insurer. He absolves the defendants in advance from all liability for any injury to his person from such negligence. It was a fair insurable risk, and Perkins agreed to assume it for himself." [17]

§ 84. *Opinion of Selden, C. J., in the Same Case.*— "It is, however, suggested, although not made a point upon

[17] Perkins v. New York Central R. Co., 24 N. Y. 196 (1862). In this case the plaintiff 's husband was killed while riding on a free pass, which contained this condition: "The person accepting this free ticket, assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using this ticket."

the argument, that on account of the very serious consequences and great risk to life which attends accidents upon railroads, public policy forbids that railroad companies should be permitted to exempt themselves by contract from those responsibilities for the safety of their passengers which the law devolves upon them. This position calls upon the court to introduce a principle entirely new. It is not pretended that there is any precedent for such a rule. Passengers have been carried by stage-coaches for centuries without the application of any such restriction upon the natural right of individuals to take care of their own interests, and to provide for their own security. No such principle has ever been applied to transportation by vessels or by steamboats. It may be said that traveling by railroad is more hazardous than by other modes. Statistics would seem to prove the contrary; but this is immaterial. The question is whether the principles of the common law which have always permitted men to manage their own affairs and to make their own contracts, provided they involve nothing immoral or illegal, are to be adhered to. Are the courts to interpose in a matter of mere private contract for the protection of individuals against the consequences of their own improvidence? It may be urged that such contracts of exemption, if permitted, will tend to a relaxation of vigilance on the part of railroad companies, and that this affects the security of large numbers of persons, and is, therefore, a matter of public interest. But we have no reason to suppose that the practice ever has been carried to such an extent as to produce any appreciable effect in this way; and there is little danger that it ever will be. It is confined to the comparatively few cases in which persons travel gratuitously. If, however, it should ever prove productive of evil consequences, which I do not apprehend, it would, I think, be better to leave the remedy to the legislature than for the courts to break in upon the settled rules of law in respect to the right of individuals to bind themselves by contract. To establish the principle contended for would be an act of

pure judicial legislation, and would, in my judgment, be an unwarrantable assumption of power. It would not be the mere application of a principle already established to a new class of cases — which is within the province of the courts — but the introduction of a new principle which has neither precedent nor analogy to support it. To this I am opposed." [18]

[18] Ibid.

CHAPTER IV.

NOTICES LIMITING LIABILITY AND THEIR EFFECT.

SECTION.

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§ 85. *Notices—Their Effect in England.*—In 1818, BURROUGH, J., said: "The doctrine of notice was never known until the case of *Forward v. Pittard*,[1] which I argued

[1] 1 Term Rep. 27.

many years ago."[2] The case referred to was decided in 1785, by Lord MANSFIELD, but the report fails to show that anything was said in it about notice. In *Bignold v. Waterhouse*,[3] decided in 1813, it was held that one who sent a parcel by a coach, having knowledge of a published notice that the proprietors would not be responsible for packages above a certain value, unless paid for according to their value, would be bound by the notice. It was this class of notices which first found favor with the courts, and which served as a foundation for Lord ELLENBOROUGH on which to base his rulings in *Maving v. Todd*,[4] and *Leeson v. Holt*,[5] that carriers could by notice exclude their liability altogether—a judicial decision destined to render the law of England, on this subject, unjust as well as uncertain for nearly half a century.

§ 86. *Justice of Permitting Notices as to Value and Character of Goods.*—Notices of this class were early held valid, and properly so. The liability of a common carrier being founded on his reward,[6] he is entitled to give notice that he will not be answerable for valuable goods, unless he is informed of their value.[7] He has a right to claim this in order that he may accommodate his charges to the value of

[2] Smith v. Horne, 8 Taunt. 144.

[3] 1 M. & S. 255.

[4] 1 Stark. 72 (1815).

[5] 1 Stark. 186 (1816).

[6] "A bailee is only obliged to keep the goods with as much diligence and caution as he would keep his own; but a common carrier, in respect of the *premium* he is to receive, runs the risk of them and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery." Lord Mansfield in Gibbon v. Paynton, 4 Burr, 2298 (1769). "His warranty and insurance is in respect to the reward he is to receive; and the reward ought to be proportionable to the risk." Ibid. "'Tis the reward that makes the carrier answerable." Lord Holt, C. J., in Tyly v. Morrice, Carthew, 485 (1699). "The true principle of a carrier's being answerable is the reward." Aston, J., in Gibbon v. Paynton, *supra*.

[7] "There seems to be only one point to which legitimately notices of carriers could be admitted, viz.: the regulation of the consideration for risk. Saving always the power of making an *express* contract, the effect

the goods committed to his care. In a very old case,[8] where the plaintiff, when he delivered a box containing money and goods, told the carrier's servant that there was a book and tobacco in it, but said nothing about the money, it was ruled that he should recover, as it was the duty of the carrier to make a special acceptance. In *Morse v. Slue*,[9] Sir MATTHEW HALE, said: "If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens. There was a case (not long since) where one brought a box to a carrier in which there was a great sum of money, and the carrier demanded of the owner what was in it. He answered that it was filled with silks and such like goods of mean value, upon which the carrier took it and was robbed. And resolved that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there was money in it he durst not take charge of it, and the owner had answered as before, this matter would have excused the carrier." Lord MANSFIELD in *Gibbon v. Paynton*,[10] disagrees with these two cases on the ground of the fraud practiced on the bailee, and speaks with approval of *Tyly v. Morice*,[11] where a bag sealed up was delivered to the carrier, the servant of the latter giving a receipt for £200, which the sender stated it contained, while in fact it contained £450. The bag being lost the court was of opinion that the carrier should answer for nothing above £200, "because there was a particular undertaking by the carrier for the carriage of £200 only; and his reward was to extend no further than that sum, and 'tis the reward that makes the carrier answerable, and since the plaintiffs had

of a mere notice ought justly to be restricted to this point, as to which alone it is competent for a carrier to refuse employment." 1 Bell's Commentaries, p. 382. This language is approved in Southern Express Co. v. Newby, 36 Ga. 635 (1867).

[8] Kenrig v. Eggleston, Aleyn, 93.

[9] Ventris, 238 (1685).

[10] 4 Burr, 2298 (1769).

[11] Carthew, 485 (1699).

taken this course to defraud the carrier of his reward they had thereby barred themselves of that remedy which is founded only on the reward." In *Gibbon v. Paynton*,[12] £100 in money was sent by the carrier hidden in hay in an old mail bag. The carrier had previously given notice by advertisement and hand bills that he would not be answerable for money, jewels or other valuables unless he had notice of them; and the evidence clearly showed that the plaintiff knew of this notice.[13] It was held that the sender could not recover. Lord MANSFIELD said: "The party undertaking ought to be apprised what it is that he undertakes, and then he will or at least may take proper care. But he ought not to be answerable where he is deceived. Here he was deceived."

Batson v. Donovan,[14] decided in 1820, presents a somewhat similar case, and likewise a difference of opinion among the judges. The defendants having given notice that they would not be answerable for parcels of value unless entered and paid for accordingly, a box containing bills and bank notes to the amount of £4,072 was delivered to them without anything being said about its contents. The box was stolen from the coach in which it was being transported, and the owner brought an action to recover its value. The trial judge left it to the jury to say whether or not the plaintiffs had dealt fairly with the defendants in not apprising them of the value of the box, and they found a verdict for the defendants. The case was taken to the Queen's Bench, and the decision turned on the duty of the owner to give notice, and its effect on the carrier's liability; on which points there was a disagreement. BEST, J., protested against the introduction of what he thought a new principle in the law relative to carriers, viz.: That the owner of a parcel of value, such parcel having nothing in

[12] *Supra.*

[13] The reports of the two former cases contain nothing about the carrier's notice.

[14] 4 Barn. & Ald. 21.

its appearance indicative of its contents being of small value, is bound unasked by the carrier to state what it is worth. A carrier who has given no notice is an insurer. Here, if the defendants had given no notice, the plaintiffs, unasked by the defendants, were not bound to say a syllable as to the value of the box. The effect of a notice is to prevent the necessity of a particular inquiry in each case. It does not affect his responsibility in case of misfeasance or negligence. Having given the notice, he is no longer an insurer of parcels of value, but he is still liable for negligence or misfeasance even if their value be not declared. Silence does not amount to fraud. This was a case of silence only and therefore not like *Gibbon v. Paynton*. But the other judges took a contrary view. They agreed with him that if the carrier gave no notice, there was no duty on the sender to communicate the value. "If the carrier," said HOLROYD, J,, "had given no notice in this case that he would not be answerable for parcels of value, it seems to me that it would not have been the duty of the plaintiffs, when they brought goods to him, to specify their quality or value; for then it would have been his duty to make inquiry, if he either wished to have a reward proportionate to their value, or to know whether they were goods of that quality for which he had a sufficiently secure conveyance; for if he had not, he might lawfully have refused to take them. * * * In cases where the carrier has not given notice or where the notice does not come to the knowledge of a plaintiff, he holds himself out as a common carrier to take goods in general, and he would then be bound to inquire the value, either if he expects an additional reward, or if he has any objection to carry any particular article." He and the two other judges, however, agreed that the effect of the omission of the owner to inform the carrier of the value prevented him from exercising the care he would have given and thus relieved him from liability except for misfeasance. BAYLEY, J., said there might be two objects in such a notice as this; the one to secure to the

coach proprietor a compensation proportional to the risk; the other to enable him to put parcels of the greatest value in a place of the greatest security. The risk upon a parcel of great value is greater than that upon a small one. The value is a tempation to thieves to make attempts which, but for that value, they would not make. The omission, therefore, to apprise the coach proprietor of the value operates in two ways. It deprives the proprietors of the extra compensation they ought to have and it prevents them from taking that extraordinary caution which, upon a parcel of extraordinary value, they naturally would take. The value is an ingredient to be taken into consideration because that may be gross negligence in the case of a parcel of large value which would be ordinary care in the case of a parcel of small value. The plaintiffs having prevented this extra care being taken by the carrier should bear the loss. ABBOTT, C. J., thought that if the carrier had known the contents of the box he would have taken better care of it; he could not take upon himself to say that he would not. An opportunity at least to do so ought to have been given him by the plaintiffs.

§ 87. *Criticism on this Practice.*—In an old work on Carriers it is said: "The favor which the courts have always shown to carriers, in relieving them where any circumstances of a fraudulent nature have appeared, has perhaps induced the latter to limit their responsibility in all cases where the goods are beyond a certain value; and thus the being allowed to make a special contract in some justifiable cases has established itself into a pretense for exempting themselves from the common law liability, without an advanced price, in almost all others. For as there are but very few parcels, etc., in comparison, of a value below the limit which carriers have fixed as the extent of their responsibility, it will appear that, except in their being compellable to take the charge of goods as public servants, and the form of action against them grounded on such a relation which an injured party has it still in his power to adapt

according to circumstances, no part of the securities or easy remedies contemplated by the ancient common law for the greater facilities of commercial intercourse at present remain, wherever the value of the goods falls within the effect of these notices. Whilst, therefore, the power of fixing the additional premium on valuable goods is usurped by such arbitrary and interested parties, and the general inclination of the public to avoid subjecting themselves to extortion, and a consequent general neglect to give the notice required, continues, carriers instead of being what they were originally intended, useful and faithful subsidiaries to public commerce, prove only arbitrary extortioners and successful evaders of the common law policy." [15]

§ 88. *Notices as to Value and Character of Goods—The Rule in America.*—Mr. Greenleaf states the rule in this country thus: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels and the information to be given to him of their contents, the rates of freight and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such and paid accordingly." [16] This is an exception to the American doctrine that a common carrier can not limit his liability by notice, and the decisions in the different States fully sustain this quotation. Thus in an early Georgia case the court say: "The only modification of the common law rule which we admit is the right of the carrier by notice brought home to the passenger [owner] to require the latter to state the nature and value of the property bailed; and to avail himself of any fraudulent acts or sayings of the bailor." [17] Speaking of the English cases

[15] Jeremy on Carriers, ch. 4 § 1 (1815).

[16] 2 Greenleaf on Evidence, sec. 215. Approved in McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867).

[17] Fish v. Chapman, 2 Ga. 349 (1847).

wherein it is held that an employer will be presumed to know the contents of notices which were published extensively, and which were reasonable and were intended to prevent fraud, as by requiring shippers to state the value of their goods, COWEN, J., in *Cole v. Goodwin*,[18] said: "So long as the printed notice of a common carrier is confined to the purposes which I have enumerated, and others calculated to save himself, without mischief to his customer or for the benefit of the latter, I see no objection in principle to giving it full effect. So far it is not a refusal to carry for a reasonable reward. So far it is not a limitation of the carrier's liability. He merely declares to the customer what is true and just. 'You know the value of your goods; I will not rummage your parcel; I will take your own account; but I will not incur the responsibility of a common carrier unless your account shall prove true. If you commit a fraud or deal captiously or capriciously on your own part, you can not complain if my duty is reduced to that of a mandatory." In a New Hampshire case, in a suit against a railroad company the company offered to prove a notice given which exempted them from being liable for all losses not caused by themselves or agents, and also providing that they should not be liable "for a greater amount than $100 on any one package or article, unless the value thereof be disclosed and an extra amount paid therefor." This notice was shown to have been known to the plaintiff, but his assent to the terms was not shown. It was held that the notice was not binding on the plaintiff except as to the clause limiting the amount of liability. PERLEY, J., said: "We do not mean to hold that there are no cases in which the carrier may, by notice, define and qualify his responsibility. It may be quite reasonable that he should insist on proper information as to the value of the article which he carries. This would not seem to be any infringement upon the principle of the ancient rule. He must have a right to know what it is that he undertakes to

[18] 19 Wend. 251 (1838).

carry, and the amount and extent of his risk. We can see nothing that ought to prevent him from requiring notice of the value of the commodity delivered to him, when from its nature or the shape and condition in which he receives it, he may need the information; nor why he should not insist on being paid in proportion to the value of the goods and the consequent amount of his risk." [19] The American courts place the justice of this exception more on the ground of the right of a carrier to have this kind of information, and the fraud practiced upon him in withholding it, than on the English argument as to the consideration. Where the shipper knows that the carrier demands and has a right to

[19] Moses v. Boston R. Co., 24 N. H. 71 (1851). See, also, Judson v. Western R. Co., 6 Allen, 485 (1863); Kallman v. United States Express Co., 3 Kas. 205 (1865); Farmers Bank v. Champlain Trans. Co., 23 Vt. 186 (1851); Magnin v. Dinsmore. 62 N. Y. 35 (1875); Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869); Fibel v. Livingston, 64 Barb. 179 (1872); The May Queen, 1 Newb. 465 (1854); New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344 (1848); Hopkins v. Westcott, 6 Blatchf. 64 (1868).

In Illinois there is a good deal of confusion in the decisions on this question. The case of Western Transportation Co. v. Newhall, 24 Ill. 466 (1860), in which it is said: "He may qualify his liability by a general notice to all who employ him of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given him of their contents, the rates of freight and the like; as for example, that he will not be responsible for goods above the value of a certain sum unless they are entered as such and paid for accordingly," has been much qualified if not overruled by later cases. See Adams Express Co. v. Stettaners, 61 Ill. 184 (1871); Oppenheimer v. United States Express Co., 69 Ill. 62 (1873), which seem to intimate that where there is nothing from which the court can impute want of good faith on the part of the shipper, the notice as to value will not avail the carrier unless both knowledge and assent to its terms are shown. But in Boskowitz v. Adams Express Co., 9 Cent. L. J., 389 (1879), decided while this book was in press, there is a dissenting opinion by Sheldon, J., in these words: "Where the provision, as here, is for the purpose of securing disclosure of value, knowledge of it brought home to the consignors is sufficient. But when it is a simple restriction of common law liability, then there must be assent in addition to knowledge. * * * The opinion, inadvertently I think, overlooks the distinction." In this state of the authorities it is impossible to say what the rule on this subject in Illinois is.

demand information concerning the value of his goods, silence on his part is the same as an assertion that his goods are of no greater value than that suggested by the carrier. The carrier is thereby not only deprived of his adequate reward, but is misled as to the degree of care and circumspection which he should exercise. Of notices of this description it remains to be said that courts and juries are liberal in inferring knowledge on the part of shippers from the fact of their publication.[20]

§ 89. *Unreasonable Charges not Permitted.*—But though a carrier is thus permitted to grade his charges according to the value of the goods and the risk he runs, he is not at liberty to charge whatever he pleases. His charges must be reasonable, and anything like extortion on his part would be promptly checked by the courts.[21] Where an express company transported for the plaintiff a package of bonds with coupons attached, valued at $40,000, from New Orleans to New York, which they refused to deliver to the plaintiff except upon the payment to them of the sum of $400, being one per centum on the estimated value, and by the receipt which they gave for the package they were not responsible for any loss or damage other than that caused by the fraud or gross negligence of themselves or their agents; and the evidence was that they bestowed the same care and diligence in the transportation of other articles and packages without reference to their value, it was held that there was no reason for enhancing the charge for transportation in proportion to the value of the articles transported; and that as the charge exceeded even the usual rate of insurance between New Orleans and New York, it was unreasonable and extravagant.[22]

§ 90. *Notices — When Severable.*— Notices as to value and in derogation of the carrier's liability, though contained in the same paper are severable — the benefit of

[20] Oppenheimer v. United States Express Co., 69 Ill. 62 (1873).

[21] Harris v. Packwood, 3 Taunt. 264 (1810); Wallace v. Matthews, 39 Ga. 617 (1869.)

[22] Holford v. Adams, 2 Duer 471 (1853).

the former being allowed to the carrier upon proof of knowledge by the shipper; the latter being unavailing in the absence of evidence of assent. In *Oppenheimer v. United States Express Company*,[23] a receipt for a parcel containing jewelry worth $3,800, was given by an express company to a firm which, for more than a year, had been in the habit of sending parcels by the express company, and had kept a book of receipts containing stipulations qualifying the liability of the company, which they usually sent with parcels to be forwarded, and which on such occasions were filled up by the express company. The receipt in question was similar to all the others, some of its conditions being designed to insure good faith on the part of the firm, as that the company should not be answerable for "any loss or damage of any box, package, or thing for over $50, unless the just or true value" should be stated in the receipt, while others were of a character limiting the duty of the company as an insurer. The court held that the qualifying clauses were severable; that the clause as to value would be taken to be assented to by the employer from his having habitually used similar receipts of the company, but that a like assent to the clauses limiting the liability of the company would not be presumed. But where an owner of goods, intrusted to a railroad company for transportation and lost, seeks to charge them as carriers, by proving the terms of one of their own notices, as to their rates and rules of transportation, he must take the notice as a whole; and the defendants are entitled to the benefits of any exception which it contains.[24]

§ 91. *Conflicting and Ambiguous Conditions.*—Notices must not be conflicting or ambiguous. In *Gouger v. Jolly*,[25] GIBBS, C. J., said that carriers should be very careful that their notices corresponded in all places where

[23] 69 Ill. 62 (1872); and see Erie R. Co. v. Wilcox, 84 Ill. 239 (1876); Moses v. Boston R. Co., 24 N. H. 71 (1851).

[24] Burroughs v. Norwich &c. R. Co., 100 Mass. 120 (1869).

[25] Holt, 317 (1816).

they were affixed as their liability would be affected by a variance. If a carrier publish two different notices, each of which is before the public at the same time, he will be bound by the least beneficial of the two.[26] Thus in *Cobden v. Bolton*,[27] on a board in the carrier's office it was stated that he would not be liable for jewels, "however small the value," unless entered and paid for as such. It was proved that he had also circulated a number of printed hand bills containing a list of his coaches, and stating that he would not be liable for any article "above the value of £5" unless entered. Lord ELLENBOROUGH ruled that the notice in the hand bills governed, and dispensed with any necessity to attend to the notice in the office. So, if at the time of the carriage he delivers a notice without any limitation of responsibility, any prior notice containing such a limitation is thereby nullified. But a second advertisement, which is simply a reannouncement of some of the provisions of a former one will not render the first nugatory. Thus in *Baldwin v. Collins*,[28] a standing advertisement in a newspaper announced that the defendants were the owners of a line of packets consisting of six ships, giving their names, tonnage, commanders and price of passage, and that one ship would sail every second Monday. It also stated that the owners would not be liable for jewelry, bullion, &c., not specially entered. A later advertisement gave notice that the Yazoo, one of the line, would leave the port on the next Monday. It was held that this did not do away with the special provisions contained in the first advertisement. In an early Maryland case,[29] the carrier had published in several newspapers the time when his stages would start and arrive, which publication contained the following clause:

[26] Munn v. Baker, 2 Stark. 255 (1817).

[27] 2 Camp. 108 (1809). In this case a question arose as to how the contents of the board, which was inlaid in the wall of the office, should be proved, and the court admitted an examined copy.

[28] 9 Rob. 468 (1845).

[29] Barney v. Prentiss, 4 H. & J., 317, *s. c.*, 7 Am. Dec. 670 (1818).

"Fare and allowance of baggage as usual. All baggage to be at the risk of the owner thereof. All baggage over twenty pounds will hereafter positively be charged and be at the risk of the owners thereof." The plaintiffs sued for the value of a parcel which the carrier had failed to deliver; it was admitted that before placing it in the carrier's hands he had known of the advertisement. The Court of Appeals, without deciding whether the carrier could or could not evade his responsibility by publication of notice, ordered judgment for the plaintiff, on the ground that if carriers "can by their publications exempt themselves from their liability, then the publications in the language of the exceptions should be plain, explicit and free from all ambiguity. But, as in the case before the court, the defendant, in the advertisement published by him, has used the most doubtful and ambiguous language, he therefore stands in the same predicament as if no publication had been made."

§ 92. *Without Notice no Duty to State Value.*—Where a carrier has given no notice of any limitation of his liability, the owner of goods is not bound to state their value. The carrier may ask the value, and then any false answer will be fraudulent and will excuse him, or, as has been shown, if there is any concealment or deception the same consequence will follow.[30]

§ 93. *Nor Where Carrier Has Other Information.*—When the value of the goods delivered is apparent, a statement of their value by the shipper would be useless, and is therefore unnecessary. Mr. Angell, citing *Marsh v. Horne*[31] and Story on Bailments,[32] states the law to be that

[30] Phillips v. Earle, 8 Pick. 182 (1829); Macklin v. Waterhouse, 5 Bing. 212, 2 M. & P. 319 (1828); Baldwin v. Collins, 2 Rob. 468 (1845); Fassett v. Ruark, 3 La. Ann. 694 (1848); Levois v. Gale, 17 La. Ann. 302 (1865); Little v. Boston &c. R. Co., 66 Me. 239 (1876); Merchants Dispatch Trans. Co. v. Bolles, 80 Ill. 473 (1875); Brown v. Camden &c. R. Co. 83 Pa. St. 316 (1877).

[31] 5 B. & C. 322 (1826).

[32] Sec. 572.

no presumption of the waiver of the notice can arise from the receipt of goods manifestly above the value stated therein, without any demand for extra payment.[33] But this is very far from being correct, as an examination of the cases will demonstrate. In *Beck v. Evans*,[34] under a notice not to be answerable for cash, notes, jewels, watches, lace, silk, etc., or "any other goods of what nature or kind soever," except on conditions which were not complied with by the customer, it was held by LE BLANC, J., that the carrier was liable for the value of a cask of brandy intrusted to his care. The opinion expressed by LE BLANC, J., it is true other judges in several later cases—*Down v. Fromont*[35] and *Levi v. Waterhouse*,[36] for example—refused to follow. But these cases can hardly be said to overrule it. In *Down v. Fromont* the package sent was a large hamper basket, and Lord ELLENBOROUGH said: "I do not think the case cited governs the present. There the carrier knowing that the article intrusted to him was a cask of brandy, necessarily knew that it was above the value of £5. But here, what was there to indicate to the defendant the contents of the package? It might have contained cash, bank notes, plate or watches to the amount of £1000, or it might have been filled with coarse materials not worth forty shillings." In *Levi v. Waterhouse* it was not clear that the servant of the carrier knew of the value of the package; it simply appeared that he might have inferred its value. The American authorities, however, none of which are cited by Mr. Angell, fully sustain the first sentence of this section. In *Boskowitz v. Adams Express Company*,[37] the court say: "When a small package contains an article of great value, there is great propriety the carrier should have information thereof, but

[33] Angell on Carriers, sec. 279.

[34] 3 Camp. 267 (1812.)

[35] 4 Camp. 40 (1814).

[36] 1 Price, Ex. 280 (1815). See also Marsh v. Horne, 5 B. & C. 322 (1826); Thorogood v. Marsh, Gow, 105 (1819); Alfred v. Horne, 3 Stark. 136 (1822).

[37] 5 Cent. L. J. 58 (1877). Supreme Court of Illinois.

in large, bulky articles, such as barrels of flour, bales of cotton and the like, there appears to be no necessity for giving information of the value; as the carrier can determine that for himself. The design is to insure good faith. Was an inquiry made of a shipper of the value of the goods about to be shipped, he would be bound to state truly the value, but when the value appears in the package itself, such an inquiry would be useless, and a voluntary statement unnecessary."[38] In a case in Alabama two bales of cotton were delivered to an express company, and the consignor accepted a receipt containing printed conditions to the effect that the company should not be liable for a sum exceeding fifty dollars unless the value of the "package" was stated in the receipt. The value was not stated, and was not asked. The court was of opinion that the bales of cotton did not come within this clause, as they could not be regarded as "packages," a word usually applied to small parcels; and that the value of a bale of cotton was a thing generally known.[39] Where a package delivered to an express company for transportation was marked C. O. D. $292, as appeared by the receipt given by the company, the receipt also providing that articles so delivered should be valued under $50, unless otherwise stated therein, the company was charged with notice of the value of the package, and with liability for the full amount.[40] So where the owner of a package told the carrier that it contained papers as valuable as money, when it in fact contained money, it was held that this was sufficient to put the carrier on his guard as to the care which should be taken of the package.[41]

§ 94. *Notice not Complied With, No Recovery at All.* — If a carrier give notice that he will not be liable for

[38] A similar view is expressed in Orndorff v. Adams Express Co., 3 Bush. (Ky.) 194 (1867); and see Boskowitz v. Adams Express Co., 9 Cent. L. J., 389 (1879); Moses v. Boston &c. R. Co., 24 N. H. 71 (1851).

[39] Southern Express Co. v. Crook, 44 Ala. 468 (1870).

[40] Van Winkle v. Adams Ex. Co., 3 Robt. 59 (1864).

[41] Dwight v. Brewster, 1 Pick. 50 (1822).

any article of more than a certain value unless specially entered as such and paid for accordingly, and these conditions are not complied with, the owner can not recover anything — not even the smaller value excluded in the notice.[42] But where the terms of the notice are that the carrier will not be liable beyond a certain sum, that sum may be recovered in any event.[43]

§ 95. *Notice May be Waived by Carrier.*—"There is no doubt," said BAYLEY, J., in an early case,[44] "that common carriers may limit their responsibility by a notice that they will not be answerable for goods of more than a certain value, but they may notwithstanding a general notice of that description be bound by a special contract with any individual." In a still earlier case,[45] Lord ELLENBOROUGH

[42] Izett v. Mountain, 4 East, 371 (1803); Nicholson v. Willan, 5 East, 507 (1804); Yate v. Willan, 2 East, 128 (1801); Clay v. Willan, 1 H. Bl. 298 (1789); Batson v. Donovan, 4 B. & Ald. 21 (1820); Harris v. Packwood, 3 Taunt. 264 (1810). In Baldwin v. Collins, 9 Rob. 468 (1845), the carrier having given notice that he would not be liable for jewelry unless specially entered, the shipper, knowing this, sent a box of jewelry without disclosing the contents. The court said: "In conclusion the counsel urges that as the defendants have not delivered any box at all, they must show that it was lost, or account to the plaintiff for the apparent value of the contents. He says it appeared to be a candle or soda biscuit box, from which we may infer he claims that the defendants should pay the value of a box of candles or soda biscuits. But the only witness who knew anything about the contents says that it did not contain either of these articles, but contained jewelry, for which we think the defendants are not responsible and shavings to which no value is affixed. The box itself is called by the witnesses 'a two and six-penny' affair, which we think is rather too small a sum to come within our jurisdiction."

[43] Clarke v. Gray, 6 East, 564; 2 Smith, 622; 4 Esp. 177 (1805).

[44] Helsby v. Mears, 5 B. & C. 504 (1826).

[45] Evans v. Soule, 2 M. & S. 1 (1813). Where an express company had uniformly given receipts for goods containing a stipulation that the company would not be answerable for over $50 for loss of any package unless its true value should be set out in the receipt, and the company had paid a loss to the plaintiffs from which it would have been relieved by pleading the qualifying clause, and afterwards the plaintiffs sued the same company for another loss, it was held that the company was not precluded by the payment of the first loss from setting up the defense of

ruled that a notice that the carrier would not be answerable for loss or damage, unless occasioned by the actual negligence of his servants, had not been waived by his having on former occasions made allowances to the plaintiff without inquiring into the cause of the damage.

The waiver may be made by the agent and will then bind the principal. One being told by the clerks of the defendant that his goods will be sent at a certain rate, and delivering them on the faith of this statement, can not be charged more, although the printed rates of the defendant are higher.[46] So, though the notice of a railroad company states that goods received after 4 P. M. will not be forwarded until the next day, the receipt of goods after that time with the assurance that they will be forwarded on that day will amount to a waiver of the notice.[47]

If an express company give a receipt conditioned that "where the value of the property is not specified in the receipt the company will not be liable for a sum exceeding fifty dollars," the company will, notwithstanding, be liable for the full value of the property in case of loss, if it appear that the receiving agent of the company was correctly informed of its value at the time of the receipt of the goods.[48] Where the carrier's notice declared that he would not be accountable for goods of a particular description above a certain value unless specified and "paid for as such" when delivered at his offices, and an article of the kind described was left with the bookkeeper, he being informed of its value and told to charge what he pleased, which would be paid provided that it was taken care of, Lord ELLENBOROUGH held that the package having been sent, the payment was waived and the notice unavailing.[49]

its qualified liability as shown by a like condition in the receipt. Oppenheimer v. United States Express Co , 69 Ill. 62 (1872).

[46] Winkfield v. Packington, 2 C. & P. 599 (1827).

[47] Pickford v. Grand Junction R. Co., 12 M. & W. 766 (1844).

[48] Southern Express Co. v. Newby, 36 Ga. 635 (1867); Kember v. Southern Express Co., 22 La. Ann. 158 (1870).

[49] Wilson v. Freeman, 3 Camp. 527 (1814).

§ 96. *Extent of Notice.*— In *Riley v. Horne*,[50] it was intimated that where carriers run a coach from A to B and back, notice that they limit their responsibility on the carriage of parcels from A to B is notice that they limit it likewise from B to A; and it was early determined that a notice not to be liable for goods beyond a certain sum applied to the property of passengers going by the coach or other carriage as well as to goods sent to be carried.[51]

A notice suspended in the offices at the termini of the route does not affect the liability of the carrier for goods received at intermediate places. In *Gouger v. Jolly*,[52] the defendant was the proprietor of a wagon which carried goods between W and L, passing through E on its way. In the offices at W and L notices were displayed restricting the liability of the carrier, but no notice was put up in the office at E, where the goods were received. It was held that the notice did not attach to the goods received at E. But where a parcel was delivered by the plaintiff's agent at W to the defendant to be carried to the plaintiff, who resided in London, and it was proved that the plaintiff received notice in London that the defendant would not be liable for any goods exceeding £5 in value unless paid for accordingly, "delivered either there or to their agents in the country," Chief Justice ABBOTT ruled that it was sufficient, especially as the very terms of the notice extended to the delivery of goods to agents in the country.[53] Where a railroad company, which was a common carrier of passengers and freight, connecting at a certain point with a line of steamboats, kept a standing advertisement as to the boats with which it would connect, and that through tickets would be furnished and baggage transported to the terminus, it was held that the information was published for the benefit

[50] 5 Bing. 217; 2 M. & P. 331 (1828).
[51] Clarke v. Gray, 6 East. 564; 2 Smith, 622; 4 Esp. 177 (1805).
[52] Holt, 317 (1816).
[53] Alfred v. Horne, 3 Stark. 136 (1822).

of passengers only and that shippers could not avail themselves of its terms.[54]

§ 97. *Modes of Giving Notice of Limited Liability.*— The methods by which carriers have sought to convey to the public the terms on which they desired to accept goods for transportation are (1), by advertisement either in newspapers or hand bills; (2), by exhibiting or posting notices, as placards, etc. (3), by notices printed upon bills of lading, receipts, checks and tickets.

§ 98. *Advertisements.*— Notices given by carriers by advertising in newspapers are little favored by the courts.[55] In a case decided in 1825,[56] in order to charge a person with

[54] Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869). In Englund it is held that a railway company is entitled to the protection against responsibility for the carriage of animals given by the second proviso of 17 and 18 Vic., c. 31, § 7, although no complete contract for the carriage has been entered into, and no complete delivery has been made; it is enough if the animal was in the course of being delivered to or received by the company. Hodgman v. West Midland R. Co., 5 B. & S. 173; 10 Jur. N. S. 673; 33 L. J. Q. B. 233: 12 W. R. 1254, affirmed on appeal, 13 W. R. 758, 6 B. & S. 560 (1865). So where one travels on a drover's pass at his own risk, the stipulation covers not only the transit on the line of railway, but also all risks included in getting access to and departure from the railway; all that takes place while he is a passenger. Gallin v. London &c. R. Co., L. R. 10 Q. B. 212, 2 Cent. L. J. 217 (1875). "What would have been the liability of the company to an ordinary passenger? A person who invites another to come on his premises is bound to take reasonable care not to expose such person to undue danger. That is the implied engagement of a railway company in the case of an ordinary passenger. Whether if the plaintiff had been a passenger traveling under no particular arrangement, the company would have been liable, it is not necessary to say. But here the company have stipulated that the plaintiff should travel at his own risk. Now that, I think, means that the company were to be free, not only of all risks arising from the acts of their own servants, but of all risks incidental to the journey, not merely during the actual transition, but before and after it, till the whole transaction was completed." *Per* Blackburn, J. See also *post*, Cap. VIII. "Load and Unload," "On the Train."

[55] Judson v. Western R. Co., 6 Allen, 485 (1863); Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859).

[56] Rowley v. Horne. 3 Bing. 2 (1825); and see Gibbon v. Paynton, 4 Burr. 2298 (1769).

notice of a limitation of liability, it was shown that he had taken for three years a newspaper in which the notice had been advertised once a week. The jury having nevertheless found a verdict against the carrier, the Court of Common Pleas refused a new trial on the ground that it could not be presumed that a person read all the contents of any newspaper he might chance to take.[57] In *Leeson v. Holt*,[58] the defendant sought to limit his liability by proving a notice to that effect, which he had inserted in the *Gazette* and the *Times* newspapers. Lord ELLENBOROUGH, while receiving evidence of the notice in the *Gazette*, thought it of little avail unless it was proved that the party was in the habit of reading that paper. The advertisement in the *Times* he refused to admit without proof that it was taken in by the plaintiff. The first instance he said in which such evidence was received was where a person inserted a notice in a provincial Sunday paper and the court held that it was admissible in evidence, because it was probable that the party had seen it, since he took the paper and the advertisement related to his business. In the case at bar it subsequently appearing that the plaintiff had occasionally read the *Times*, the advertisement contained in it was allowed to be read. In a case in our own courts it was said: "The mere publication of a notice in one or more newspapers, no matter how long the time, of an intention not to be responsible for particular articles, unless upon disclosure of contents and value, is not sufficient to release the carrier from responsibility. The notice must be brought home to the shipper or depositor. The circumstance of its being published in several newspapers is one fact; that the party was a regular subscriber to and reader of one or more of those papers is

[57] Lord Ellenborough in Munn v. Baker. 2 Stark. 255 (1817), thought that a person might be expected to look into the *Gazette* for notices of dissolution of partnerships, but not for notices by carriers of the limitations of their responsibility. There being no official newspaper like the *Gazette* in this country, the distinction is not applicable here.

[58] 1 Stark. 186 (1816).

another important fact."[59] Even in this day it would be difficult to prove knowledge of a notice from publication in a newspaper in these cases. Notices of this class are not like notices of judicial proceedings and similar matters which by statute are valid by publication. Recognizing this, they have been abandoned by common carriers almost entirely.

§ 99. *Posting Notices—Placards.*—Notices contained in placards, though more common, have hardly fared better in the courts. In one of the early English cases[60] in order to affect the plaintiff with knowledge of a notice limiting the carrier's liability, it was proved that it was painted on a board and hung up in the defendant's office. The plaintiff's servant testified that he had taken goods to the office, had frequently been there before, and had seen the board, but that he did not suppose there was anything upon it; that although he could read, he had never in fact read the notice until after the loss. Lord ELLENBOROUGH said: "You cannot make this notice to this non-supposing person; it is difficult to struggle with the common law; and it is incumbent on a person who wishes to rid himself of his responsibility at common law to give effectual notice."[61] So the contents of a placard are ineffectual where the party sought to be charged is unable to read.[62] In the leading American case of *Hollister v. Nowlen*,[63] evidence that a notice was conspicuously placarded in most of the stage offices of the route, and particularly where the plaintiff had resided for three years immediately preceding the loss of the trunk, which was the cause of action, was not considered

[59] Baldwin v. Collins, 9 Rob. 468 (1845).

[60] Kerr v. Willan, 6 M. & S. 150; 2 Stark. 53 (1817).

[61] "The merely putting up a board in their office ought not to satisfy a jury." Best, C. J., in Brooke v. Pickwick, 4 Bing. 218 (1857); Drayson v. Horne, 27 W. R. 793, 32 L. T., N. S. 691; Clayton v. Hunt, 2 Camp. 17 (1811); Butler v. Heane, 2 Camp. 415 (1810).

[62] Davis v. Willan, 2 Stark. 279 (1817); note to Smith v. Horne, Holt 646 (1817).

[63] 19 Wend. 234 (1838). See also Cole v. Goodwin, Id. 251 (1838).

sufficient to authorize a jury to infer knowledge in the plaintiff of the terms on which the coaches were run.

A passenger by boat is not bound by written or printed notices, posted in the boat in conspicuous places, stating the carrier's regulations as to the delivery of baggage.[64] In *Macklin v. New Jersey Steamboat Company*,[65] a notice containing these words: "Baggage not allowed in cabin or state-rooms. This company will not be liable for baggage unless checked," was posted up in different parts of the boat. The plaintiff took his satchel to his state-room, where it was stolen. He testified that he did not see the notice. DALY. J., said: "Notices may be employed by the carriers as a means of bringing to the passenger's knowledge any reasonable regulation; but it does not follow from this that it is obligatory upon him to read all such notices; for if we were to hold that, we would have to hold that whether he read them or not, it being obligatory upon him to read them, he would be chargeable with a knowledge of their contents; and this is further than the law has ever gone." In *Walker v. Jackson*,[66] a notice at the door of a ferry where foot passengers entered was rejected when offered in a case where the plaintiff had entered by the carriage way. Where a passenger had been in the habit of going on a train and there paying her fare, a new rule posted in the office was held not to be sufficient notice to her.[67] Where there was posted up in a railroad car notices limiting the company's liability for passengers baggage and as to smoking in the cars, standing on the platforms, and putting heads and arms out of the windows, and the plaintiff, a passenger in the car, admitted that he had read the notice as to smoking and standing on the platform, it was held that there was no presumption that he had seen the notice as to

[64] Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 229 (1868); Gleason v. Goodrich Trans. Co., 32 Wis. 85 (1873). See, however, Whitesell v. Crane, 8 W. & S. 369 (1845).

[65] 7 Abb. Pr. (N. S.) 229 (1868).

[66] 10 M. & W. 161 (1842).

[67] Lake Shore &c. R. Co. v. Greenwood, 79 Pa. St. 373 (1875).

baggage.[68] In a Connecticut case, dressed poultry, packed in ice, was shipped on board a steamboat for New York. It appeared that the carrier had sometimes, when prevented from sailing at the appointed time, sent such perishable freight by railroad. The boat was detained by fog, and the poultry injured by the detention owing to the melting of the ice, no attention being paid to it. The carrier signed a receipt which stated the contents of the boxes shipped; but he did not observe what these boxes of poultry contained, or he would have sent them by rail. The carrier had for a long time advertised and posted a notice on his boat that poultry was at the owner's risk, but the plaintiff had no knowledge of it. The carrier was held liable.[69]

§ 100. *The Use of Receipts Resorted to — The English "Carrier's Act."*—The unfriendliness of the courts to notices by advertisement and placards having become manifest, the carrier must needs have recourse to other means. In 1828 Chief Justice BEST suggested that if carriers would but deliver to their customers at the time of receiving their goods written memoranda of the terms on which they would carry, the vexed question of notices would be ended.[70] The same opinion had been expressed by the Court of Common Pleas in 1825,[71] and by Lord ELLENBOROUGH in 1817,[72] who said that in this way the difficulty of proving knowledge of the notice would be removed, BAYLEY, J., adding, that if a carrier never took in a parcel without a receipt he would be indemnified. Carriers were not slow in acting upon these suggestions, and either a bill of lading, a receipt, a check or other written or printed voucher, has come to be used by them almost without exception in every contract at the present day.[73] In England

[68] Malone v. Boston &c. R. Co., 12 Gray, 388 (1859).
[69] Peck v. Weeks, 34 Conn. 145 (1867).
[70] Riley v. Horne, 5 Bing. 217, 2 M. & P. 331 (1828).
[71] Rowley v. Horne, 3 Bing. 2 (1825).
[72] Kerr v. Willan, 6 M. & S. 150, 2 Stark. 53 (1817).
[73] Shelton v. Merchants Dispatch Co., 36 N. Y. (Sup. Ct.) 527 (1873), s. c. 59 N. Y. 258 (1874).

by the statute 11 Geo. 4, 1 Wm. 4, c. 68, § 1, called the Carrier's Act, it is provided that no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or property of the following description, viz.: Gold or silver coin of the realm or of any foreign state; gold or silver in a manufactured or unmanufactured state; precious stones, jewelry, watches, clocks, or any time-pieces of any description; trinkets, bills, notes of any bank in England, Scotland or Ireland; orders, notes, or securities for payment of money; English or foreign stamps; maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles; glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not with other materials; furs, lace, or any of them; contained in any parcel or package delivered either to be carried for hire or to accompany the person of any passenger, if the value exceed £10, unless, at the time of the delivery, value and nature be declared, and an increased charge or engagement to pay the same be accepted. By § 2, the rate of such increased charge is to be notified by a public notice, affixed in legible characters in some conspicuous part of the office, warehouse or receiving house, which shall bind the parties sending without farther proof of its having come to their knowledge. By § 3, carriers are to give, if required, receipts for packages, acknowledging the same to be insured: and if not given when required, or the notice be not affixed, they are not to have the benefit of the act. By § 4, no notice shall limit or in anywise affect the liability at common law of carriers, in respect of any articles to be conveyed by them, unless such as are mentioned in the act, and to which it extends. By § 6, nothing in the act is to extend or be construed to annul or in anywise affect any special contract between parties for the conveyance of goods. By § 8, nothing is to be deemed to protect carriers from liability to answer for loss or injury arising from the felonious acts of servants, nor to protect servants from lia-

bility for loss or injury occasioned by their own personal neglect or misconduct. The provisions of this statute have not been adopted in any of the States, and the various decisions which have been made under it are for the most part not applicable here, and are therefore not given.

§ 101. *Notices Only Proposals for Contracts.*—Inland bills of lading, receipts, tickets, checks and other written or printed vouchers containing notices limiting their liabilities while really adopted by common carriers to enable them to evade their responsibilities have, on account of the stand taken by the courts in this country in opposition to these attempts, but little virtue at the present day, and serve only as inducements to enter into special contracts, or to speak more plainly, as decoys to entrap the unwary. For it has been seen that with the exception of that class of notices which is designed to insure good faith on the part of the bailor in the transaction, the American doctrine does not allow the carrier to limit his liability, either as a bailee or as an insurer, by anything short of a contract, express or implied. A notice can not be made to bind the customer simply from the fact that it was brought to his knowledge. *A notice is only a proposal for a contract;* it must therefore be also shown that it was adopted as the contract between the parties.[75] But as notice on the part of the carrier and assent thereto on the part of the shipper are equivalent to an express contract,[76] the question as to what is sufficient evi-

[75] Bean v. Green, 12 Me. 422 (1835); Sager v. Portsmouth &c. R. Co., 31 Me. 228 (1850); Fillebrown v. Grand Trunk R. Co., 55 Me. 462 (1867); Little v. Boston &c. R. Co., 66 Me. 239 (1876); Mobile &c. R. Co. v. Weiner, 49 Miss. 725 (1874); Western Transportation Co. v. Newhall, 24 Ill. 466 (1860); Blumenthal v. Brainerd, 38 Vt. 402 (1866); Kimball v. Rutland, &c. R. Co. 26 Vt. 247 (1854); Farmers &c. Bank v. Champlain Trans. Co., 18 Vt. 131 (1846), *s. c.*, 23 Vt. 186 (1851); Mann v. Birchard, 40 Vt. 326 (1867); McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867). Public notice given by a carrier that he will not be responsible for freight, or that it will be at the risk of the owner, will not vary the carrier's liability. Derwort v. Loomer, 21 Conn. 245 (1851); Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485 (1854); Hale v. New Jersey Steam Nav. Co., 15 Conn. 539 (1843); and see cases cited *ante*, Cap. II.

[76] Kellogg, J., in Blumenthal v. Brainerd, 38 Vt. 402 (1866).

dence of assent becomes an important one, and one upon which there has been much difference of opinion in the courts. The argument which is found in a number of cases that after a carrier has given notice that he will accept goods only on certain conditions, which notice has been brought to the knowledge of the customer, the latter, by afterwards delivering his property to him, must be understood as agreeing that it shall be carried according to the terms of the notice, would be conclusive, provided the law permitted the carrier to insist on the terms of his notice, and to refuse employment on any other condition. Nor is the fact that the shipper has seen the notice, any proof that that he accepts its conditions.[77] It would certainly be going too far to presume any willingness at all on his part to relieve the carrier from any portion of those duties cast upon him by the law of the land, such an idea being entirely irreconcilable with the natural sagacity of men, and their universal desire to enter into those bargains alone which shall most benefit them. "Conceding that there may be a special contract for a restricted liability," says BRONSON, J., in a leading American case,[78] "such a contract can not, I think, be inferred from a general notice brought home to the employer. The argument is that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident

[77] It is settled that assent is not necessarily to to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go farther and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service of the carrier was to be rendered." Buckland v. Adams Ex. Co., 97 Mass. 124 (1867); Moses v. Boston &c. R. Co., 24 N. H. 71 (1851).

[78] Hollister v. Nowlen, 19 Wend. 234 (1838).

to his employment. If the delivery of the goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, can not warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract can not be implied where there is such an equipoise of probabilities."

§ 102. *Assent From Accepting Papers Containing Contract.*—Most of the courts hold that anything inserted *in* a bill of lading becomes a part of the contract between the parties (if not illegal), if accepted by the shipper without dissent on his part to its terms. The bill of lading is conclusive evidence of the contract and its acceptance is sufficient evidence of assent to its terms.[79] In the absence of fraud it is presumed that the shipper reads the bill of lading, for it is

[79] Steele v. Townsend, 37 Ala. 247 (1861); Taylor v. Little Rock, &c. R. Co., 32 Ark. 393 (1877); Lake v. Hurd, 38 Conn. 536 (1871); Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869); Mulligan v. Illinois Cent. R. Co., 36 Iowa, 180 (1873); Robinson v. Merchants Dispatch Trans. Co., 45 Iowa, 470 (1877); The Emily v. Carney, 5 Kas. 645 (1864);

his duty to do so.[80] "Bills of lading," says COOLEY, J., "are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations on his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one; and if the delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else, as, for instance, a mere receipt for money, it could not be held binding on him as a contract, inasmuch as it had never been delivered to and accepted by him as such. But except in these and similar cases, it can not become a material question whether the consignor read the bill of lading or not"[81] This class of instruments is, as has been said, of almost

McCoy v. Erie &c. Trans. Co., 42 Md. 498 (1875); Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871); May v. Babcock, 4 Ohio, 334 (1829); Cincinnati, &c. R. Co. v. Pontius, 19 Ohio St. 221 (1869); Lawrence v. McGregor, Wright 193 (1833); Adams Express Co. v. Sharpless, 77 Pa. St. 516 (1875); Colton v. Cleveland &c. R. Co., 67 Pa. St. 211 (1870); Farnham v. Camden &c. R. Co. 55 Pa. St. 53 (1867). Whether a clause in a bill of lading exempting a carrier from liability for loss by fire becomes a contract by mere acceptance, was doubted in The Sultana v. Chapman, 5 Wis. 454 (1856), and also in Falvey v. Northern Transportation Co., 15 Wis. 129 (1862), where it is said that such a receipt would not bind the owner if he had never seen it and had not expressly assented to it. In Detroit &c. R. Co. v. Farmer's Bank, 20 Wis. 127 (1865), the latter case is explained by saying that it did not appear that the bill of lading had ever been delivered. But it is now settled in this State that acceptance is evidence *prima facie* of assent. Boorman v. American Ex. Co. 21 Wis. 152 (1866); Strohn v. Detroit &c. R. Co. 21 Wis. 554 (1867).

[80] Grace v. Adams, 100 Mass. 505 (1868); Hoadley v. Northern Trans. Co., 115 Mass. 304 (1874).

[81] McMillan v. Michigan R. Co., 16 Mich. 79 (1867).

universal use, and on account of their uniform character the rule is almost universally established that persons receiving them are bound to know that they contain the terms on which their property is to be carried.[82] They, therefore, become the contract between the parties, and can not, as a general rule, be varied or contradicted by parol.[83]

The same view is taken by many courts of the case of express receipts.[84] In *Kirkland v. Dinsmore*,[85] the plaintiff delivered to an express company a package of money to be transported, and received a receipt containing a printed condition that the company would not be liable for loss "occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam." The package was lost by the accidental burning and sinking of a vessel at sea. When he took the receipt the plaintiff supposed it was a naked receipt; did not know it was a contract, and did not read the conditions or assent to them. The Court of Appeals of New York reversing the judgment of the Supreme Court, held that the conditions were binding on the shipper. ANDREWS, J., said: "He [the owner] can not escape from the terms of a contract, in the absence of fraud or imposition, because he negligently omitted to read it, and when the other party has a right to infer his assent, he will be precluded from denying it to the other's injury. The plaintiff is, we think, in that position. The contract was one which the parties might lawfully make. The defendant had a right to infer from the plaintiff's acceptance of the

[82] Blossom v. Dodd, 43 N. Y. 264 (1870); Steinweg v. Erie R. Co., 43 N. Y. 123 (1870).

[83] Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221 (1869); White v. Van Kirk, 25 Barb. 16 (1856); Wolfe v. Myers, 3 Sandf. 7 (1849); and see further *post* Chap. V.

[84] Huntington v. Dinsmore, 6 Thomp. & C. 195, *s. c.* 4 Hun. 66 (1875); Brehme v. Adams Ex. Co. 25 Md. 328 (1866); compare Newberger v. Express Co., 6 Phila. 174 (1866); Olwell v. Adams Express Co. (Tenn.) 1 Cent. L. J. 186 (1874); Christenson v. American Express Co., 15 Minn. 270 (1870); Snider v. Adams Express Co., 63 Mo., 376, 4 Cent. L. J. 179 (1876); Soumet v. National Express Co., 66 Barb. 284 (1873).

[85] 62 N. Y. 171 (1875), reversing, *s. c.* 4 Thomp. & C. 304 (1874).

receipt without dissent, that he assented to its terms, and now after a loss has occurred, it is too late to object that he is not bound. If he had objected at the time, the defendant would have been entitled to exact, as a condition of carrying the parcel, a compensation equivalent to the risk of insurers. The circumstances imposed upon the plaintiff the duty to read the receipt." The court distinguish this case from that of *Blossom v. Dodd*,[86] which was a passenger's ticket, with a notice as to the liability of the carrier for baggage.

§ 103. *Other Cases Showing Assent to Terms of Notices.* —In the following cases assent was presumed by the court: Where a railroad company sent notice to a merchant that it would in future carry his goods on certain conditions, and he afterwards delivered them to the company without raising any objection to the notice.[87] Where goods, having arrived at their destination, the carrier gave notice to the consignee that, if not removed, he would hold them, not as a common carrier, but as a warehouseman, at his risk, and subject to the usual warehouse charges, and the owner failed to remove them.[88] Where, in a bill of lading containing the words "which are to be delivered at Detroit," the freight agent inserted in red ink between "at" and "Detroit" the words "Toledo for," and immediately forwarded the goods, and sent back the bill of lading, but the goods were lost by fire at Detroit, and the shipper failed to dissent within a reasonable time.[89] Where blank receipts were left by the carrier with the customer for daily use, and were filled up by his clerk.[90] Where it was the usual course of business for a shipper of goods to send his boxes,

[86] 43 N. Y. 264 (1870).

[87] Walker v. York &c. R. Co., 2 El. & Bl. 750 (1853).

[88] Mitchell v. Lancashire &c. R. Co., L. R. 10 Q. B. 256 (1875).

[89] Muller v. Cincinnati, &c.R. Co., 2 Cin. 280 (1872).

[90] Gibson v. American &c. Express Co., 1 Hun, 387 (1874); and see Oppenheimer v. United States Express Co., 69 Ill. 62 (1873); Erie R. Co. v. Wilcox, 84 Ill. 239 (1876); Field v. Chicago &c. R. Co., 71 Ill. 458 (1874); Merchants Dispatch &c. Co. v. Moore, 88 Ill. 136 (1878).

&c,, to a carrier by a teamster, and for the carrier to deliver to the teamster a bill of lading for each shipment, which bill was in a form containing an exception of loss by fire, and was brought by the teamster to the shipper and retained.[91] Where a shipper and owner of goods, at the time of delivering the same to an express company for transportation, also delivered to the express company for their signature a blank receipt, filled up by him at his office, containing the names of both parties, and a series of conditions and clauses regulating the manner of transportation and the liability of the express company in certain cases and contingencies, and such receipt at the time of the delivery of the merchandise was presented by the shipper to the express company for their signature, and was signed by the latter and returned to the shipper.[92] Where plaintiff had been in the habit of doing business with the carrier, and had been furnished by him with a book of its blank receipts, from which the receipt for the goods, valued at more than $50, had been taken and sent to defendant to sign when delivered; the receipt contained a stipulation that the carrier's liability for loss or damage should not exceed $50, unless the true value should be stated in the receipt. A blank left in the receipt for the value was not filled, and it appeared that neither defendant nor its agent who received and receipted for the package, knew that the value of the goods exceeded $50.[93]

§ 104. *What Not Sufficient Evidence of Assent.* — In Illinois it is held that from the mere acceptance of a bill of lading, or receipt, which contains conditions restricting the carrier's liability no presumption of assent to its terms can arise,[94] nor from the previous receipt without objection

[91] Van Schaack v. Northern Trans. Co., 3 Biss. 394 (1872); compare Adams Express Co. v. Stettaners, 61 Ill. 184 (1871).

[92] Falkenau v. Fargo, 44 How. Pr., 325; *s. c.* 35 N. Y. (Sup. Ct.). 332 (1872).

[93] Westcott v. Fargo, 63 Barb. 349, *s. c.*, 6 Lans. 319 (1872); affirmed, 61 N. Y. 542 (1875).

[94] Adams Express Co. v. Stettaners, 61 Ill. 184 (1871); Adams Express

of similar papers containing similar conditions.[95] In a Massachusetts case evidence that frequently, but not invariably, the carrier had given to the plaintiff receipts containing a printed clause limiting his liability for goods transported by him, and that, in this instance, after receiving the goods, he gave to a servant of the plaintiff a receipt therefor, containing such a printed clause; but that over part of this clause in this receipt a revenue stamp was so pasted as to render it unintelligible, and that until after the loss neither the plaintiff nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, was held not sufficient to warrant a finding that the plaintiff had assented to any limitation of the defendant's liability.[96] Proof that the shipper paid for the transportation at a tariff of charges under which by the carrier's printed table of rates, the latter assumed no responsibility for certain losses, is not sufficient evidence that

Co. v. Haynes, 42 Ill. 89 (1866); Boskowitz v. Adams Express Co., 5 Cent. L. J. 58 (1877); Anchor Line v. Dater, 68 Ill. 369 (1873); Am. &c. Express Co. v. Schier, 55 Ill. 140 (1870); Erie &c. Trans. Co. v. Dater, 8 Cent. L. J. 293 (1879); Boskowitz v. Adams Express Co., 9 Cent. L. J. 389 (1879). The opinion has been expressed by this court that where the receipt contains unfair and oppressive limitations, if any presumption at all is to be indulged in, the reasonable one would certainly be that the conditions were not accepted. "It will be observed," says Walker, C. J., in Adams Express Co. v. Haynes, *supra*, "that the receipt upon which this suit is brought contains provisions which were designed to relieve plaintiffs in error from almost every species of responsibility. It is true that it leaves them liable for fraud and for gross negligence, but even then only to the extent of $50. We are at a loss to conjecture how a sane man could be induced to receive such an agreement knowing its contents. If he understood its terms and conditions, he knew that he was licensing the company or any of its numerous agents or employees to appropriate all of the property thus intrusted to their care by paying him the sum of $50. And it appears that he paid an eighth of that sum nominally for transportation of the property, but it looks more like a premium for violating their trust. No person can be surprised that $500 worth of property, intrusted to them under such a receipt, never reached its destination, but it would have been singular if it had."

[95] Erie &c. Transportation Co. v. Dater, 8 Cent. L. J. 293 (1879).

[96] Perry v. Thompson, 98 Mass. 249 (1867).

the terms were known to the shipper and that he assented to them.[97]

§ 105. *Notices Attached to Papers Containing Contract.* —When we come to notices attached to receipts or bills of lading, or printed on their back, there is less difficulty, as most of the courts have made a distinction between this class, and conditions contained in and therefore a part of bills of lading, contracts or other receipts.[98] It is said in Illinois that there is no difference between public notices by advertisement or placard, and notices printed *on the back* of a receipt,[99] and so far as assent to their terms is sought to be inferred from their acceptance, the latter are equally impotent. In *Railroad Company v. Manufacturing Company*,[100] decided by the Supreme Court of the United States in 1872, a receipt given by a railroad company referred to certain rules and regulations of the company, "a part of which notice is given on the back hereof." On the back were printed certain conditions restricting the common law liability of the company. The receipt was taken by the consignor without either assent or dissent. It was held that the notice was not operative to relieve the company. "The considerations against the relaxation of the common law responsibility by public advertisement," said Mr. Justice DAVIS, "apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain by indirection exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury

[97] Baltimore &c. R. Co. v. Brady, 32 Md. 333 (1869).

[98] Newell v. Smith, 49 Vt. 255 (1877).

[99] Western Trans. Co. v. Newhall, 24 Ill. 466 (1860). But in Illinois under the late decisions the distinction between bills of lading and receipts, tickets and checks, is not preserved. See Erie &c. Transportation Co. v. Dater, 8 Cent. L. J. 293 (1879).

[100] 16 Wall. 318.

to commerce, to allow the carrier to say that a shipper of merchandise assents to the terms proposed in a notice whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of this relation equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property with restrictive conditions annexed and says nothing, that he intends to rely upon the law for the security of his rights. It can readily be seen if the carrier can reduce his liability in the mode proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community." This ruling has been more recently followed by WALLACE, J., in a case in the United States Circuit Court at New York, in which it is said: "That this conclusion conflicts with many decisions of high authority in this country and England must be conceded; but the case furnishes a rule of plain and certain application, and sweeps away many fine and artificial distinctions, which have involved in confusion the whole doctrine of notices and special contracts as affecting the rights and liabilities of common carriers. Some of these cases have turned upon the point whether the conditions in a

printed receipt were in small type or in large, or whether the receipt was taken deliberately or hurriedly, while one case in the court of last resort in this State places controlling emphasis upon the fact that the receipt was taken by the shipper in a dimly lighted car, and holds that it was, therefore, not a contract.[101] Another case in the Supreme Court of the same State holds the receipt a contract although taken by a foreigner ignorant of the language in which it was printed and to whom no explanation of its terms was vouchsafed.[102] Thus, while one man is absolved from obligation because it may be inconvenient for him to inform himself of the terms of the proposed contract, another is held. The theory, of course, is that assent to the proposed contract is or is not implied from the circumstances of the transaction, but the cases illustrate the utter uncertainty of the test of assent, when one man who is ignorant of the language of the proposed contract is presumed to assent, while another is absolved because, from the type in which it is printed or the light by which he is to read it, he can not acquaint himself with the terms without more or less inconvenience. The rule held by the Supreme Court of the United States is capable of certain and easy application, and, if adhered to, will go far to abrogate a class of contracts to which, practically, the carrier is the only party." [103] In a Michigan case, the notice of exceptions was printed on the back of the receipt given for the goods, and the receipt on its face referred to the exceptions. "Some evidence of assent to the terms of the notice," it was said,

[101] Blossom v. Dodd, 43 N. Y. 264 (1870).

[102] Fibel v. Livingston, 64 Barb. 179 (1872); Warhus v. Bowery Savings Bk., 21 N. Y. 543 (1860).

[103] Ayres v. Western R. Co., 14 Blatchf. 9 (1876). "It is not intended to be decided that the appearance on the bill of lading of the written words: 'Subject to the conditions of the company,' was such notice of the contents of any paper containing so called 'conditions of the company,' as to bind the party who accepted the bill of lading to a statement in such conditions limiting what would otherwise be the liability of the vessel on the terms of the bill of lading." The Isabella, 8 Ben. 139 (1875).

"is necessary, from which a contract may be implied. In such case if it is sought to be inferred from the acceptance of a receipt specifying a limitation of liability, or referring to an accompanying notice for such limitation; or if it is sought to be inferred from previous notice and dealings; if it appear that the price of freight was made lower in consideration of such special restriction, and the party has received the benefit of such reduction of freight, such or similar facts might, and undoubtedly would, furnish strong evidence of assent. But if in a case otherwise similar, no such difference in the price of freight was made, or if the party had paid or agreed to pay the higher rate, or the price uniformly demanded according to the tariff of the company in all cases, or if no optional tariff of prices of which the forwarding party may avail himself is shown to exist, little or no inference of assent to such special terms can be drawn without allowing the company in effect to limit their liability by a mere notice."[104]

§ 106. *Railroad and Steamboat Tickets.*—Notices printed on tickets or checks are within the rule mentioned in the last section, because neither a ticket nor a check is evidence of a contract. A railroad or steamboat ticket is nothing more than a mere voucher that the party to whom it is given and in whose possession it is has paid his fare and is entitled to be carried a certain distance.[105] In a case which arose in New York in 1858, it being contended before the Court of Appeals that certain passage tickets were in themselves written evidence of the terms on which the passenger was to be carried, and that he was therefore precluded from contradicting them by parol evidence, DENIO, J., said: "We do not think this a sound position. The tickets do

[104] Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859).

[105] Nevins v. Bay State Steamboat Co., 4 Bosw. 225 (1859); Rawson v. Pennsylvania R. Co., 48 N. Y. 212 (1872); Brown v. Eastern R. Co., 11 Cush. 97 (1853); Malone v. Boston &c. R. Co., 12 Gray, 388 (1859); Quimby v. Vanderbilt, 17 N. Y. 306 (1858); Wilson v. Chesapeake &c. R. Co., 21 Gratt. 654 (1872).

not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage money; and their office is to serve as tokens to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board. They are quite consistent with a more special bargain. Being the usual permits which were issued for the guidance of the masters of the vessels and the conductors of the carriages, they would necessarily be given to the passenger to facilitate the transaction of the business whatever the nature of the arrangement for passage may have been." [106] The American cases generally support this view. In *Burnham v. Grand Trunk Railway Company*,[107] where a passenger received a railway ticket, on which was printed a statement "good for this day only," it was held that he might prove by parol that at the time that he bought the ticket the ticket agent of the railway company told him that he could stop over for a day at an intermediate station before arriving at the destination mentioned in the ticket. "The real contract between the plaintiff and the ticket agent was made before the ticket was seen. The plaintiff paid his money upon the statement of the agent and not upon any indorsement upon the ticket. He took the ticket, not as expressing a contract, but as proof of the contract he had already made with the agent. He had neither seen nor assented to the indorsement nor was he asked to assent to it. As between the plaintiff and agent the contract was definite, with no misunderstanding or suggestion of it." In a Massachusetts case,[108] it was ruled that where a ticket

[106] Quimby v. Vanderbilt, 17 N. Y. 306 (1858).

[107] 63 Me. 298 (1873).

[108] Brown v. Eastern R. Co , 11 Cush. 97 (1853), and see Malone v. Boston &c. R. Co., 12 Gray, 388 (1859).

The following extract from the opinion of the court states the whole case: "The limitation and notice thereof were, in the present instance, attempted to be established under these circumstances. The traveler, a female, had delivered her trunks to the baggage master of the defendants to be carried to Freeport. They were received by him without any

is given to a passenger containing a limitation on the back in printed letters to the effect that the carrier will not be answerable for baggage exceeding fifty dollars in value, unless additional freight is paid on it, it will be a question for the jury whether the passenger had notice of the condition before commencing his journey.

notice of any limitation of liabilities for safe transportation, and marked for their proper destination. Subsequently the owner applied for her passage ticket to Freeport, and was informed that they did not sell tickets to Freeport, but that she could buy one for Brunswick, a place remote, with the privilege of stopping at Freeport, and having one dollar refunded; and that thereupon she paid three dollars and received a ticket to Brunswick. The ticket had on its face the route and various railroads to be passed over, and the notice that one dollar would be refunded to those stopping at Freeport. There was no notice on the face of the ticket of any conditions or limitations as to transporting the baggage of passengers. The only notice as to that was on the back side of the ticket. No direct notice was given by the ticket vendor, nor was any request made to her to read the limitations and conditions stated on the back of the ticket. It was admitted that there was no actual or constructive notice of the limitation of the carrier's liability unless the same was derived from the ticket received by the plaintiff. This being so, the case was in our opinion properly put to the jury, and their verdict for the plaintiff may well be sustained." Speaking of notices printed on railroad tickets, Dewey, J., in Brown v. Eastern R. Co., 11 Cush. 97 (1853), distinguishes between such as appear on the face and on the back of tickets: "A mere passenger ticket in the form in general use would not naturally induce to the minute reading of its contents. The party receiving it might well suppose that it was a mere check signifying that the party had paid his passage to the place indicated on his ticket. But if it be correct to hold that if this limitation had been stated on the face of the ticket and in connection with the name of the place to which the party was to be carried, and so might be presumed to have been read and therefore binding upon the person receiving the ticket; yet nevertheless a statement or notice to this effect placed upon the back of the ticket, and detached from what ordinarily contains all that is material to the passenger, would not raise a legal presumption that the party at the time of receiving the ticket, and before the train had left the station, had knowledge of the limitation or conditions which the carrier had attached to the transportation of the baggage of the passengers." In a New York case, the court say: "It would be unreasonable to presume that a passenger when he buys a railroad ticket at a ticket office, stops to read the language printed on it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract or in any way limits the carrier's common law liability. * * The con-

The case of notices limiting the liability of carriers and appearing on steamboat tickets has received much attention in England in late cases, and the rule which has been at length established in regard to this class of vouchers is founded on common law principles, the statutes of that country in relation to notices by common carriers, such as the Railway and Canal Traffic Act already referred to, being inapplicable to carriage of this character.[109]

In *Zunz v. South Eastern Railway Company*,[110] the plaintiff took a through ticket from the London station of the South Eastern Railway Company to Paris. The ticket was in three coupons: 1. From London to Dover; 2. From Dover to Calais; 3. From Calais to Paris. Upon the ticket was printed the following condition: "The company is not responsible for loss or detention of or injury to luggage of the passenger traveling by this through ticket except while the passenger is traveling by the company's trains or boats." His portmanteau was lost on the journey between Calais and Paris. COCKBURN, C. J., said: "The special contract is set out on the face of the ticket; and however hard it may seem to hold that a passenger is bound by words printed upon a ticket in small letters, and which, in the hurry of the last moment at a railway station, he has no opportunity of making himself acquainted with, there is no doubt that it has been settled by decided authorities that he must be presumed to know the contents of the ticket and to be bound by such contents." None of the "decided author-

tract between these parties was made when the plaintiff bought her ticket and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights. She was not then obliged to submit to a contract which she never made or leave the train and demand her baggage." Rawson v. Pennsylvania R. Co., 48 N. Y. 212 (1872). But see Laing v. Colder, 8 Pa. St. 479 (1848); Beckman v. Shouse, 5 Rawle, 179 (1835); Camden &c. Trans. Co. v. Baldauf, 16 Pa. St. 67 (1851).

[109] *Ante*, Cap. II., sec. 27.

[110] L. R. 4 Q. B. 539 (1869); and see Palmer v. Grand Junction R. Co., 4 M. & W. 749 (1839).

ities" are cited by the chief justice, and as a subsequent judge has expressed himself as wholly unable to find them, the authority of this case is very doubtful. But the decision of most interest in this connection, and one certain to remain as high authority, alike on account of the thorough discussion which it received, and of the character of the tribunal in which it was finally determined, is that of *Henderson v. Stevenson*,[111] decided by the English House of Lords in 1875. The plaintiff purchased at the defendant's office in Dublin a ticket for his passage from Dublin to Whitehaven on one of the defendant's steamers. This ticket had on the face these words only, "Dublin to Whitehaven." There was no reference on the front to the back of the ticket. On the back of the ticket was the following indorsement: "This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury or delay, to the passenger, or to his or her lugguge, whether arising from the act, neglect or default of the company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company." The plaintiff did not read the indorsement, nor was his attention directed to it by anyone. The steamer was wrecked on the passage, entirely through the negligence of the captain and crew, and all of the plaintiff's luggage lost. He brought suit to recover its value in Scotland, and the Lord Ordinary and the Court of Session having both decided in his favor, the company appealed to the House of Lords. It was here again held that the plaintiff was not bound by the condition. "It seems to me" said the Lord Chancellor, "that it would be extremely dangerous not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else

[111] L. R. 2 Sch. & Div. 470 (1875).

printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited." Lord CHELMSFORD, said: "The Lord Chief Justice in the case of *Zunz v. South Eastern Railway Company*,[112] which has been referred to, thought himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it, he must be presumed to know the contents of it and must be bound by them. I was extremely anxious to be referred to the authorities which influenced the judgment of the Lord Chief Justice; but although numerous authorities were cited by Mr. Milward, none of them go the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money has been paid. Or if a ticket is necessary to bind the company, the moment it is delivered the contract is completed before the passenger has had an opportunity of reading the ticket, much less the indorsement." Lord HATHERLY expressed the same opinion: "I agree with the observation that was made, by my noble and learned friend, Lord CHELMSFORD, that the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A

[112] L. R. 4 Q. B. 544 (1869).

ticket is in reality in itself nothing more than a receipt for the money which has been paid."

The conclusions to be drawn from these cases are that a ticket is a mere voucher of payment; that there must be notice to the passenger of any condition it may contain at or before the completion of the contract; that it is immaterial whether a condition limiting the carrier's liability is contained on the face or the back of a ticket, unless the passenger has read it or unless his attention has been called to it before the completion of the contract, and that from the bare possession of the ticket constructive knowledge of its conditions can not be presumed.

A distinction is taken in a New York case [113] between ordinary steamboat tickets and ocean steamship tickets, for the reason that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight, and that there is, therefore, no room in such a case for the suggestion that the party is surprised into a contract, when he supposes himself only to be taking a token indicative of his right. In the case referred to, an ocean steamship company, on receiving a passenger's fare, gave her a printed ticket signed by their agent, containing a stipulation that the company should not be liable for loss of baggage except in case of gross negligence of the company or its agents, and then only to the amount of $50, unless a bill of lading or receipt specifying the articles was signed; and that money, jewelry and all valuables, were at the passenger's risk, unless placed in the company's charge and a bill of lading or receipt signed therefor. On going aboard, the passenger's trunk was given in charge of the company's agents, who assumed to take charge of it; but the company failed to produce or account for the trunk at the end of the voyage. In an action to recover for the loss of the trunk and contents, it was held that in the absence of a bill of lading or receipt as specified in the contract, a recovery could not

[113] Steers v. Liverpool &c. Steamship Co., 57 N. Y. 1 (1874).

be had for over $50, and no recovery could be had for jewelry or silver ware. In an English case the facts and decision were very similar. A passenger by steamer from America paid for and received a ticket from the agents of the owners, containing a condition exempting the owners from liability in case of loss or detention of the ship by accidents of navigation or perils of the sea, and from responsibility for luggage, unless bills of lading had been signed therefor. It was held that where a passenger had not had a bill of lading signed for his luggage, he could not recover for its loss, though the loss was occasioned by the ship having been wrecked owing to the negligence of the captain.[114]

Acceptance of a free railroad ticket, bearing an indorsement that the person "accepting this ticket" agrees that the company shall not be liable for certain losses, is said to constitute a contract on the part of the passenger with the company, qualifying the carrier's common law liability. The passenger will be presumed to have known the contents of the ticket, at the time of the acceptance.[115]

§ 107. *Baggage Checks.*—Nor are checks for baggage of such a character as to raise the presumption that the person to whom they are delivered knows their contents or assents to their terms. A diligent search has failed to reveal a single decision in which conditions in restriction of his liability and contained in this kind of token have been of any avail to the carrier, though the defense has been before the

[114] Wilton v. Atlantic Royal Mail Steam Navigation Co., 10 C. B. N. S. 453 (1861).

[115] Wells v. N. Y. Cent. R. Co., 24 N. Y., 181 (1867); affirming, *s. c.*, 26 Barb. 641; Smith v. N. Y. Cent. R. Co., 24 N. Y. 222 (1862); Perkins v. N. Y. Cent. R. Co., 24 N. Y. 196 (1862). In the last case it is said: "Applying for a pass or free ticket; taking it and having it in his possession some six or eight hours before the starting of the train in which he was to go; and having his attention expressly called to its terms, taken in connection with the fact found by the jury that he was at the time of the accident actually riding on this ticket, if not conclusive against him as a legal presumption, would at least be evidence that he assented to the terms indorsed upon the ticket from which a jury would be authorized to imply such assent."

courts in the following cases: In *Blossom v. Dodd*,[116] at the time that a receipt for baggage was given to the plaintiff he was in a car which was so dark that it was impossible for him to read certain printed stipulations on it. These were in fine print, but a direction to "read this," was in conspicuous print. It was held that the plaintiff was not presumed to know the contents of the receipt or to have assented to them. In a subsequent case in the same State[117] the defendant's agent came into the car in which the plaintiff was seated, called for baggage, received a check for his trunk and directions for its delivery, made an entry in pencil in his tally book, marked on the receipt the date, the number of the check and the place of delivery of the trunk, handed it to the plaintiff and immediately passed on, nothing further being said to or by the plaintiff. The latter folded the paper and without looking at or reading it, put it in his pocket. The car was dimly lighted, and the plaintiff could not, in the place where he was seated, have read the receipt. He saw the agent writing on the paper, but supposed he was writing his address. The receipt was marked upon its margin "Domestic bill of lading," and purported to be a contract relieving the plaintiff from liability beyond $100 in certain specified cases, among others a loss or detention through his negligence, unless the baggage was specially insured. The circumstances were more favorable for the carrier than in *Blossom v. Dodd*, for the receipt was printed in larger type and on a larger piece of paper. But judgment for the full amount of the loss being obtained on the trial, it was affirmed by the Supreme Court and again, on appeal, by the Court of Appeals. "The terms for carrying," said SPIER, J., "vary as to distances to be carried, weight, quality and character of the property to be carried. The business itself implies an express contract, the terms of which are to be ascertained. In such a case the party is

[116] 43 N. Y. 264 (1870).

[117] Madan v. Sherard, 10 J. & S. 353 (1877); 73 N. Y. 330 (1878).

bound to treat the paper as a contract when he takes it, and must be assumed to do so. But in the case of carrying a trunk from a railway station to one's residence by express, and delivering into the hands of an agent a check containing the number, and receiving a receipt, does not necessarily imply terms of limitation to be set down in writing. It may be an implied contract, and it might or it might not contain terms of limitation. In such a case a person to whom the receipt is delivered is not obliged, as matter of law, to make himself acquainted with its terms and bound by them as if he had done so." CURTIS, C. J.: "No case holds that a traveler receiving a receipt of this nature, and under like circumstances where it is impossible to read it, and no intimation is given him of its embracing a contract, is bound by such contract. Besides, there are intrinsic difficulties in extending any such immunity from liability to parties engaged in the porterage of travelers baggage at night in large communities. The printing near the commencement of the receipt the words 'Domestic bill of lading' does not obviate the distinction drawn in the cases above referred to, though possibly so intended." ANDREWS, J.: "The plaintiff on receiving the paper had, from the nature and circumstances of the transaction, a right to regard it as designed simply as a voucher to enable him to follow and identify his property; and if he had no notice that it was intended to subserve any other purpose or that it embodied the terms of a special contract, his omission to read it was not *per se* negligence. When a contract is required to be in writing and a party receives a paper as a contract, or when he knows or has reason to suppose that a paper delivered to him contains the terms of a special contract, he is bound to acquaint himself with its contents, and if he accepts and retains it, he will be bound by it although he did not read it. But this rule can not, for the reasons stated, be applied to this case, and the court properly refused to charge as matter of law that the delivery of the receipt created a contract for the carriage of the trunk under its terms." The

cases of *Prentice v. Decker*,[118] *Limburger v. Westcott*,[119] and *Sunderland v. Westcott*,[120] are to the same effect.

In Indiana it has been held that a printed limitation on the back of a check for baggage that the carrier will not be bound over one hundred dollars in case of loss, is not binding on the passenger unless his express assent to the limitation is shown—the mere receipt of the check is no evidence of such assent,[121] the court referring with confidence to Lord ELLENBOROUGH'S "non-supposing person,"[122] and saying: "We may well conclude that a passenger receiving a metal check for his baggage marked with its destination and the number would be "non-supposing" of the release of the carrier's liability stamped upon the other side."

§ 108. *Manner of Printing Notices.*—Notices which show upon their face an attempt to disguise their real purpose obtain little sympathy from the courts—as when small type is used to set out the conditions in order that they may escape the attention of the customer. It was early said that a notice, in order to avail the carrier, ought to be in such large characters that no person receiving it could fail to understand its terms unless grossly negligent,[123] and emblazoning the general object of a notice on the paper in large letters, while the restrictions are stated in small ones, is suffi-

[118] 49 Barb. 21 (1867).

[119] 49 Barb. 283 (1867).

[120] 2 Sweeney, 260 (1870). The plaintiff's danghter, accompanied by another young girl, delivered a check for a trunk to the clerk of a transfer company at New York, with directions to carry it to her home in Brooklyn. She was about to leave the office when, at her companion's suggestion that she ought to have a receipt, she returned to the desk and demanded a receipt of the clerk, who handed her one in which, among other things, it was stipulated that the company should not be liable to an amount exceeding $100, unless a special contract was made. The trunk and its contents were worth $300, but nothing was said as to its value, neither did she read the receipt or see its contents until after the loss of the trunk. It was held that the notice was ineffectual. Woodruff v. Sherrard, 9 Hun, 322 (1876).

[121] Indianapolis R. Co. v. Cox, 29 Ind. 360 (1868).

[122] See *ante*, Cap. IV. sec. 99.

[123] Clayton v. Hunt, 3 Camp. 27 (1811).

cient to render it ineffectual.[124] In an old case,[125] a hand-bill was nailed upon the door of the receiving office of the carrier which stated in large print the many advantages of the route, and in small characters at the bottom that the carrier would not be answerable for goods above the value of £5 unless entered and paid for accordingly. Lord ELLENBOROUGH: "This is not enough to limit the defendant's common law liability. We have not sufficient evidence of any special contract. The jury ought to believe that at the time when the trunk was delivered at the wagon office the plaintiff or his agent there saw, or had ample means of seeing, the terms on which the defendant carries on his business. How can this be inferred from the hand-bill nailed on the door, which called the attention to everything that was attractive and concealed what was calculated to repel customers? If a common carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it." In several cases in this country where restrictive conditions in bills of lading have been upheld, the courts have laid stress upon the fact that the conditions were expressed in the papers in a way not calculated to escape attention.[126]

[124] Verner v. Sweitzer, 32 Pa. St. 208 (1858).

[125] Butler v. Heane, 2 Camp. 415 (1810).

[126] Grace v. Adams, 100 Mass. 505 (1868); Hoadley v. Northern Trans. Co., 115 Mass. 304 (1874); Snider v. Adams Ex. Co., 63 Mo. 376, 4 Cent. L. J. 179 (1876). In Steers v. Liverpool &c. Steamship Co., 57 N. Y. 1 (1874), the court, in sustaining a condition in an ocean steamship ticket, say: "A printed *fac-simile* of this paper is before us, and although part of it is in smaller type than the rest, no part of it is in such type as to suggest to the mind the idea of concealment as the possible motive for it being thus printed. It is all printed on one side of the paper, and all the printed matter precedes the signature of the agent of the defendant."

CHAPTER V.

CONTRACTS LIMITING LIABILITY AND THEIR EFFECT.

SECTION.

109. Character of Employment Not Changed by Contract.
110. Except in Special Cases.
111. Contract How Evidenced.
112. Bills of Lading.
113. Written Contract Conclusive.
114. Effect of Subsequent Delivery of Writings Limiting Liability.
115. Collateral Agreement or Supplementary Contract May be Shown.
116. Other Cases Where Parol Evidence Admissible — Fraud — Mistake — Duress.
117. The English "Railway and Canal Traffic Act."
118. "Just and Reasonable" Conditions.
119. Conditions Not "Just and Reasonable."
120. Conditions Sustained by the American Courts.
121. Unreasonable and Void Conditions.
122. Regulations in the Transportation of Live Stock.
123. Means of Carrying Out Conditions Must be Provided.
124. Insurance.
125. Usages and Customs.

§ 109. *Character of Employment Not Changed by Contract.*—It has been said in some cases [1] that where a limited responsibility is contracted for by a common carrier, he thereby loses that character, and becomes a private carrier or an ordinary bailee for hire. But this view is obviously incorrect, and is supported by neither reason nor authority. It is only in the absence of contract that the law defines the

[1] As in Penn v. Buffalo &c. R. Co., 49 N. Y. 204 (1872); Lake Shore &c. R. Co. v. Perkins, 25 Mich. 329 (1872), *per* Graves, J.

responsibilities of common carriers in their widest sense; if the parties have made their own arrangement, that contract will govern unless contrary to the policy of the law. The character of the employment remains unaffected, although the liabilities of the carrier may be modified to any extent allowed by law. In *Railroad Company v. Lockwood*,[2] Mr. Justice BRADLEY referred to the discussion which this subject has received in these words: "It is argued," he said, "that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers

[2] 17 Wall. 357 (1873).

and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?" In a Michigan case[3] MARTIN, C. J., illustrates the status of the parties under a special contract, by the somewhat analagous employment of an inn-keeper. "An inn-keeper is one who keeps a house open for the entertainment of travelers; and the law, in his case (as in that of common carriers), imposes upon him special liabilities as to his guest's property. Yet no one doubts but that such liability may be lessened or restricted by a contract between the landlord and such guest; and if it should be, I apprehend no one would consider the former any the less an inn-keeper. He is still exercising his public employment, and bound by his primary obligation, namely, to entertain all persons applying; and this obligation extends in favor of the traveler who may, by special contract, have released him from some or all of the extraordinary liabilities imposed by the law in his behalf. It is upon the basis of his holding such character that the contract is made."[4] For these reasons a party engaged as a common carrier can not, by declaring or stipulating that he shall not be so considered, divest himself of the liability attached to the fixed legal character of that occupation—as, for example, in the case of an express company contracting not to "carry" but to "forward."[5]

[3] Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859).

[4] See also Davidson v. Graham, 2 Ohio St. 131 (1853); Graham v. Davis, 4 Id. 362 (1854); Swindler v. Hilliard, 2 Rich. (S. C.) 216 (1846); Parker v. Brinson, 9 Id. 201 (1856); Steele v. Townsend, 37 Ala. 247 (1861).

[5] Bank of Kentucky v. Adams Ex. Co., 93 U. S. 174, 4 Cent. L. J. 35 (1876); Read v. Spaulding, 5 Bosw. 409 (1859); affirmed 30 N. Y. 630

§ 110. *Except in Special Cases.*—"A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York city and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regular established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." [6]

§ 111. *Contract How Evidenced.*—Although in this country there is no general law requiring contracts limiting the liabilities of common carriers to be in writing, and such contracts are therefore good if made by parol,[7] the difficulty of proving an express agreement to waive any part of the carrier's duties in any case renders it necessary that negotiations of this character should be evidenced by something more definite than mere words. It has therefore become the almost universal practice for the carrier at the time of the receipt of the goods to put in writing the terms upon which they are received for transportation. Such writings are commonly called bills of lading.

(1864): Stadhecker v. Combs, 9 Rich. (S. C.) 193 (1856); Reed v. United States Express Co., 48 N. Y. 462 (1872); St. Louis &c. R. Co. v. Piper, 13 Kas. 505 (1874); Blossom v. Griffin, 13 N. Y. 569 (1856).

[6] Mr. Justice Bradley in Railroad Co. v. Lockwood, 7 Wall. 357 (1873).

[7] American Trans. Co. v. Moore, 5 Mich. 368 (1858); Dunn v. Branner, 13 La. Ann. 452 (1858); Roberts v. Riley, 15 La. Ann. 103 (1860); Shelton v. Merchants Dispatch Co., 36 N. Y. (S. C.) 527 (1873), *s. c.*, 59 N. Y. 258 (1874).

§ 112. *Bills of Lading.*—In strictness a bill of lading is the acknowledgment given by the master of a vessel stating the receipt of the goods, setting out the engagement to carry and deliver, and executed in triplicate, one copy being sent to the consignee, one retained by the consignor and one by the master.[8] But similar instruments, except that no duplicates are made, are now used by carriers by land, and are also denominated bills of lading, though sometimes the word "inland" is prefixed to the description; and the papers delivered by express companies are of like character.[9] A bill of lading is therefore at once a receipt and a contract; and so far as it is merely the former it may be varied or contradicted by parol evidence.[10] Thus the quantity of goods received, the contents of boxes or bales or the like, and their value or condition, may be shown by parol to be different from the statements regarding them made in the receipt.[11] So, one who forwards goods by express is not absolutely concluded by a recital of the value contained in the express receipt. He may show, for instance, notwithstanding that the receipt values the package at fifty dollars, that the package was received by the company's agent with full knowledge that it contained a much larger sum; and on such proof being made, the liability of the company for loss is not limited to fifty dollars.[12]

§ 113. *Written Contract Conclusive.*—But in respect to the agreement to carry and deliver the goods, the bill of lading or other writing delivered and accepted as the agreement between the parties constitutes, with its exceptions,

[8] Abbott's Law Dictionary, 148.

[9] *Ante* Cap. IV. § 102.

[10] Cox v. Peterson, 30 Ala. 608 (1857); Wayland v. Moseby, 5 Ala. 430 (1843); Meyer v. Peck, 28 N. Y. 590 (1864). See *post*, Cap. VIII. "Good Order and Condition," "Value and Contents Unknown." The caption of a bill of lading is a part of the contract. Robinson v. Merchants Dispatch Trans. Co., 45 Iowa, 470 (1877); Stewart v. Merchants Dispatch Trans. Co., 47 Iowa, 229 (1877).

[11] Ibid.

[12] Kember v. Southern Express Co., 22 La. Ann. 158 (1870); Southern Express Co. v. Newby, 36 Ga. 635 (1867).

the contract between them, and it is immaterial whether it was read at the time of signing or accepting or not, or whether anything was said about the exceptions contained in it.[13] This is simply to say that a party entering into a contract is presumed to do so with his eyes open, and in the absence of fraud or mistake can not be allowed to pretend to agree to that which it is his intention afterwards to repudiate. Such a contract is to be construed like all other written contracts, according to the legal import of its terms, and it may not be varied by parol evidence.[14] One accepting a bill of lading which expressly exempts the carrier from liability for certain losses, will be bound by the terms of the exemption, although at the time of the acceptance he stated that the carrier would be liable notwithstanding this clause, this being merely an opinion as to the legal effect of the bill of lading.[15]

Likewise, as in the case of other contracts, the writing becomes the sole evidence of the undertaking and all antecedent agreements or undertakings are merged therein and extinguished thereby.[16] As where the contract stipulates

[13] Bank of Kentucky v. Adams Express Co., 93 U. S. 174 (1876); 4 Cent. L. J. 35 (1876); York Company v. Central Railroad, 3 Wall, 107 (1865); Grace v. Adams, 100 Mass. 505 (1868); Wells v. Steam Nav. Co., 8 N. Y. 375 (1853); Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485 (1854); Kirkland v. Dinsmore, 62 N. Y. 171 (1875). See *ante*, Cap. IV. § 102.

[14] White v. Van Kirk, 25 Barb. 16 (1856); Wolfe v. Myers, 3 Sandf. 7 (1849); Cox. v. Peterson, 30 Ala. 608 (1857); Wayland v. Moseby, 5 Ala. 430 (1843); Roberts v. Riley, 15 La. Ann. 103 (1860); Indianapolis &c. R. Co. v. Remmy, 13 Ind. 518 (1859); Oppenheimer v. United States Ex. Co., 69 Ill. 62 (1873); *ante* Cap. IV. § 102.

[15] Pemberton Co. v. New York Cent. R. Co., 104 Mass. 144 (1870).

[16] Southern Express Co. v. Dickson, 94 U. S. 549 (1876); Collender v. Dinsmore, 55 N. Y. 200 (1873); Long v. New York Cent. R. Co., 50 N. Y. 76 (1872); Belger v. Dinsmore, 51 N. Y. 166 (1872). In Collender v. Dinsmore, *supra*, it was said: "There are cases holding in effect that the prior negotiations and conversation of the parties can be given in evidence, when there is an ambiguity, to show in what sense particular words or phrases were used by the parties in making the contract," citing Selden v. Williams, 9 Watts, 9 (1839); Gray v. Harper, 1 Story, 574 (1841); Kemble v. Lull, 3 McLean, 272 (1843). But Kemble v. Lull

that the goods may be forwarded by any carrier, &c., evidence of a verbal direction given by the shipper at the time is inadmissible.[17]

§ 114. *Effect of Subsequent Delivery of Writings Limiting Liability.*—But it should nevertheless be borne in mind that upon the receipt of goods for transportation the liability of the common carrier commences, and this liability, whether unconditional or partly qualified, can not be altered by the subsequent delivery to the customer of a bill of lading altering the contract as first made.[18] If one contracts to send goods by a carrier, which he delivers and pays the price of carriage, and afterwards, and after the goods have been forwarded, the carrier hands him printed receipts for the goods containing exceptions in his favor, and it does not appear that the contents of the receipts were made known to the bailor and assented to by him, the former agreement will not be affected by the receipts, but the liability of the carrier will remain as at common law.[19] In *Bostwick v. Baltimore &c. Railroad Company*,[20] it was held that where goods are shipped under a verbal agreement, a delivery two days thereafter of a bill of lading containing conditions would be ineffectual to protect the carrier. In *Hill v. Syracuse &c. Railroad Company*,[21] the plaintiff delivered to the defendant a quantity of wool upon a parol agreement with an agent of the company that it would be shipped within two weeks. Afterwards, and upon the same day, receipts were given to him by which the defendant was exempted from all liability arising from delay. The plaintiff did not examine the receipts, except to see that the weight was correct, and did not notice the conditions until the next

decides nothing of the kind. The court only remarked that there was no ambiguity in the contract, and that parol evidence was not admissible to explain or vary it.

[17] Hinckley v. New York Cent. &c. R. Co., 56 N. Y. 429 (1874).

[18] Shelton v. Merchants Dispatch Co., 36 N. Y. (S. C.) 527 (1873).

[19] Coffin v. New York Cent. R. Co., 64 Barb. 379 (1872).

[20] 45 N. Y. 712 (1871).

[21] 8 Hun, 296 (1876); reversed, 73 N. Y. 351 (1878).

day. The Supreme Court of New York, relying on *Bostwick v. Baltimore &c. Railroad Company*,[22] held that the parol agreement was not merged in the receipts and that the plaintiff was entitled to recover. On appeal to the Court of Appeals this ruling was reversed, the latter court distinguishing it from the *Bostwick* case, on the ground that so short a time having elapsed between the parol agreement and the delivery of the paper, they should be considered as parts of the same transaction.

A carrier can not, after a loss has occurred, restrict his liability by signing and delivering a bill of lading.[23] Therefore a stipulation limiting the liability of common carriers, contained in receipts for goods given by them to the sender of the goods, on his request, after the loss of the goods, does not affect the sender's rights; nor are they affected by the fact that he had recently been their freight agent, and that receipts given by him as such contained the same stipulation.[24] But where at the time of the delivery of the goods a simple receipt, called a shipping receipt, is given to the consignor which states that a bill of lading will be issued at a place designated therein, and that the goods are to be

[22] 45 N. Y. 712 (1871).

[23] The Edwin, 1 Sprague, 477 (1859); Cleveland &c. R. Co. v. Perkins, 17 Mich. 296 (1868). A shipper delivered a portion of a quantity of wool to a railroad company for transportation, the understanding being that the balance should be delivered as soon as the company notified him that they had cars in which to ship it. This they afterwards did, and the balance of the wool was delivered to and accepted by them, at which time the shipper signed a shipping request which contained certain exemptions in favor of the company. Some of the wool having been lost before the balance was shipped the exemptions were held not to apply to that. Detroit &c. R. Co. v. Adams, 15 Mich. 458 (1867). A package was delivered to a carrier at New York, marked "Iowa City," and a receipt given to the consignor, which entitled him to a bill of lading. Some days after, the carrier, knowing that the goods had been destroyed *in transitu* at Chicago, gave the shipper a bill of lading which undertook to carry the package only to Chicago. *Held*, that the bill of lading was of no effect to restrict the carrier's liability. Wilde v. Merchants Dispatch Trans. Co., 47 Iowa, 247 (1877).

[24] Gott v. Dinsmore, 111 Mass. 45 (1872).

transported subject to the conditions expressed in the bill of lading, the latter in the absence of fraud binds the consignor.[25] In a case of this kind the court said: "It [the receipt] advises the consignor where to apply for bills of lading, and provides that the merchandise is to be forwarded subject to the conditions contained in the bill of lading, to the point to which the bills of lading would be given. The consignors were notified that the contract was not the one which the law would imply from the simple delivery and receipt of the merchandise, but that it was to be such an one as should afterwards be embodied in a printed and written bill of lading. The consignors might have procured the bill of lading before the goods were shipped, or might have directed that the goods be not moved until the bill of lading had been procured. Then if the terms contained in the bill of lading were unsatisfactory or were not assented to, they might refuse to make the shipment. But having permitted the goods to go forward under an agreement that the terms of shipment should be contained in a bill of lading, they * * must be bound by whatever terms are in good faith inserted in the bill of lading."

§ 115. *Collateral Agreement or Supplementary Contract May be Shown.*—But though parol evidence is not admissible to contradict a bill of lading, yet it is admissible to prove a collateral agreement, such as that the carrier agreed to carry the goods to a point beyond that named in the bill of lading.[26] In an English case,[27] A had arranged orally with a railway company to carry goods for him to E, on their line, and thence by a connecting line to K; and at the same time signed, without noticing its contents, a consignment note by which the goods were directed to be taken to E. Parol evidence was admitted to show an agreement to carry on to K. But parol evidence is not admissible to prove that the carrier is not a carrier for the whole distance

[25] Wilde v. Merchants Dispatch Trans. Co., 47 Iowa, 272 (1877).
[26] Baltimore &c. Steamboat Co. v. Brown, 54 Pa. St. 77 (1867).
[27] Malpas v. London &c. R. Co., L. R., 1 C. P. 336 (1866).

stated in his bill of lading.[28] And where a freight bill does not appear on its face to be the contract of a railroad company, parol evidence is not admissible to show that it is the contract of the company.[29]

§ 116. *Other Cases Where Parol Evidence Admissible —Fraud—Mistake—Duress.*—The bailor may, of course, show, notwithstanding the possession by him of the carrier's receipt, that he never, in fact, accepted the paper as a contract binding between himself and the carrier.[30] In a very late case in Illinois, the receipt of an express company contained a condition that if the value of the goods sent were not stated the carrier would not be liable for over $50. Three packages of expensive furs were delivered by the shipper to the company without anything being said about the value, and were destroyed by fire in transit. To overcome this clause in the receipt, the plaintiff on the trial offered evidence to prove that the company, through its agents, had solicited his patronage on the same terms as other companies, viz., that the goods in which he dealt should be taken on non-valuation rates, which offer the court rejected. This ruling was reversed on appeal. "It was," said SCOTT, J., "most important evidence, tending to show why no valuation was stated. If not required to do so by express contract with defendant, or by the uniform course of business with defendant and other carriers, then the plaintiffs were not bound in the first instance, unless in-

[28] Chouteaux v. Leech, 18 Pa. St. 224 (1852).

[29] Dixon v. Columbus &c. R. Co., 4 Biss. 137 (1868).

[30] Boorman v. American Ex. Co., 21 Wis. 152 (1866); Strohn v. Detroit &c. R. Co., 21 Wis. 554 (1867); King v. Woodbridge, 34 Vt. 565 (1861). Parties doing business as forwarders and also as carriers, agreed orally with the owners to transport merchandise to be delivered to them from time to time; and subsequently, on receiving a portion thereof to be transported under this agreement, they gave a receipt, stating that the same was received to be forwarded. *Held*, that they were responsible as carriers and not as forwarders. The receipt did not exclude evidence of the agreement under which it was given, and the words "to be forwarded," should not, in such case, be construed in a technical sense. Blossom v. Griffin, 13 N. Y. 569 (1856).

quired of concerning the actual value of the goods, to state any valuation. The testimony excluded was important for another reason, as tending to show why neither party paid any attention to the limitation clause in the receipt taken for the goods. On the understanding such goods as the plaintiffs were shipping were to be and had been received and carried at non-valuation rates, neither party was interested to consider the limitation clause. It was evidence, to say the least of it, that tends to show that neither party attached any importance to that clause in the receipt." [31]

Fraud and mistake may also be shown.[32] Where the shipper of goods who has previously entered into an oral agreement with a common carrier, takes a receipt for the same, he has a right to assume, in the absence of notice to the contrary, that his agreement is embraced in the paper or receipt, or at least that his receipt contains nothing to the contrary; and it is in the nature of a fraud on the part of the carrier having entered into such oral agreement, to insert in the receipt a contract of an entirely different character, and present it to the shipper, without calling his notice to it or getting his assent.[33] In an English case the plaintiff at the time the goods were delivered at the defendant's warehouse, being asked by a clerk to sign a paper, expressed his unwillingness to do so, because he could not see to read it, whereupon the clerk said it was of no consequence and that the signature was a mere matter of form. The plaintiff relying upon these assurances signed it, but it turned out to be a contract limiting the defendant's liability. It was held by the Court of Common Pleas that the plaintiff was not bound.[34] As a common carrier can not coerce the owner to yield assent to a limitation of responsibility by

[31] Boskowitz v. Adams Express Co., 9 Cent. L. J. 389 (1879).

[32] The Wisconsin v. Young, 3 G. Greene, 268 (1851); Meyer v. Peck, 28 N. Y. 590 (1864); Collender v. Dinsmore, 55 N. Y. 200 (1873); Long v. New York Cent. R. Co., 50 N. Y. 76 (1872); Belger v. Dinsmore, 51 N. Y. 166 (1872); Adams Express Co. v. Guthrie, 9 Bush. 78 (1872).

[33] Strohn v. Detroit &c. R. Co., 21 Wis. 554 (1867).

[34] Simons v. Great Western R. Co., 2 C. B. (N. S.) 620 (1857).

making exorbitant charges when his assent is refused to a condition limiting the general liability of the carrier,[35] it has been said in one case that where there exists an extraordinary necessity for the immediate transportation of goods and the carrier refuses to take them except under a special contract, the exaction of such a contract ought not to be sanctioned—such unreasonable extortion being equivalent to duress.[36] No court has as yet gone this far in protecting the public against the exactions of common carriers.

But it seems clear, under the rule laid down in these cases that the contract to be binding on the shipper must be entered into understandingly, that it would be competent for the latter to show that a limiting clause in a receipt or other paper was left in by mistake.[37] The case of *Adams Express Company v. Nock*,[38] decided by the Court of Appeals of Kentucky in 1866, supports this view. There an agent of the consignor delivered to a common carrier's agent goods for transportation, and filled a blank in a printed receipt prepared by the carrier, stipulating against liability beyond the sum of $50, the written part merely describing the articles and their value, and naming the consignor and consignee and place of ultimate delivery, but at the time of so filling neither read nor understood the conditions of the receipt, nor signed any printed indorsement acknowledging acceptance of the conditions, and the consignor never saw the receipt until the goods were lost. The court held that the consignor's agent was a competent wit-

[35] Wallace v. Matthews, 39 Ga. 617 (1869).

[36] Adams Express Co. v. Nock, 2 Duv. 562 (1866). It is said in a Connecticut case that the fact that the shippers had caused bills of lading to be printed for their own convenience, and had been in the habit of filling up blanks for themselves and then sending them to the carrier's agent to sign, would entire disprove the plea of compulsion in obtaining the assent to the conditions. Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869).

[37] Chouteaux v. Leech, 18 Pa. St. 224 (1852); Warden v. Greer, 6 Watts, 424 (1837).

[38] 2 Duv. 562.

ness to prove that he did not read or understand, and did not accept the condition limiting the carrier's liability, and in the absence of such full and complete understanding and acceptance, the carriers were liable for a loss of the goods to their full value.

§ 117. *The English "Railway and Canal Traffic Act."* — The English statute known as the "Railway and Canal Traffic Act," [39] and which has already been referred to, makes notices by railway and canal companies, limiting their liability as carriers, void; but it does not prevent them from entering into special contracts for the carriage of goods, provided the conditions contained in such contract are such as are held "just and reasonable" by the judge or court before whom any question relating thereto is tried, and provided the contract is signed by the party delivering the goods to be carried. It seems that a contract *prima facie* unjust and unreasonable, becomes "just and reasonable" if an alternative is left to the party forwarding or delivering the goods to enter into a contract which is "just and reasonable." [40] The question as to what are to be considered as "just and reasonable" conditions, as these words are here used, has been before the English courts in numerous cases.

§ 118. "*Just and Reasonable*" *Conditions.*—Under this statute the following conditions have been held to be "just and reasonable," and therefore within the power of carriers of this class to impose upon their customers by special contract: That "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days after they should have been delivered;" [41] that in the case of goods conveyed at special or mileage rates the company will not be respon-

[39] 17 and 18 Vic., ch. 31, § 7. See *ante*, Cap. II, § 27.

[40] Gallagher v. Great Western R. Co., 8 Ir. C. L. (N. S.) 326 (1874).

[41] Simons v. Great Western R. Co., 18 C. B. 805 (1856); Lewis v. Great Western R. Co., 5 H. & N. 867 (1860). But see Garton v. Bristol &c. R. Co., 1 B. & S. 112 (1861), *per* Cockburn, C. J.

sible for any loss or damage however caused;[42] that "in respect of goods destined for places beyond the limits of the company's railway, and as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance;"[43] that fish would only be conveyed by a railway by special agreement by particular trains, and that the sender should sign the following conditions: "The company shall not be responsible under any circumstances, for loss of market, or for other loss or injury arising from delay, or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud;"[44] that "the company will not be responsible for any damage to any meat on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof;"[45] that horses shall be carried at the owner's risk.[46] A contract to carry "at owner's risk" is not unreasonable where a carrier offers to carry in this way for a less price than where he insures; that fact being known to the employer. The carrier would still be liable for misconduct; but the packing of goods by his servants in such a manner as to cause their injury would not be misconduct, unless the servants knew that injury would result from the manner of packing.[47] A party sent cattle under the care of a drover, to be carried by railway. At the time of receiving the cattle the drover signed a note presented to him by the company, containing the following stipulation:

[42] Simons v. Great Western R. Co., 18 C. B. 805 (1856).

[43] Aldridge v. Great Western R. Co., 15 C. B. (N. S.) 582 (1864).

[44] Beal v. South Devon R. Co., 3 H. & C. 337 (1864); 5 H. & N. 875 (1860); White v. Great Western R. Co., 2 C. B. (N. S.) 7 (1857).

[45] Lord v. Midland R. Co, L. R. 2 C. P. 339 (1867).

[46] McCance v. London &c. R. Co., 7 H. & N. 477 (1861); Gannell v. Ford, 5 L. T. (N. S.) 604, Q. B. (1861); Harrison v. London &c. R. Co., 2 B. & S. 12 (1860); Wise v. Great Western R. Co., 1 H. & N. 63 (1856); Robinson v. Great Western R. Co., 14 W. R. 206, 35 L. J. C. P. 123 (1865).

[47] Lewis v. Great Western R. Co., L. R. 3 Q. B. D. 195 (1877).

"The company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation or from being trampled on, bruised or otherwise injured in transit, from fire, or from any other cause whatsoever. The company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market." The company gave the drover a free pass to travel with the train. The cattle were not put into the truck used for the carriage of cattle, but into two vans used for the carriage of goods, which were entirely closed on every side, and could only be opened by a sort of lid or slide. The drover saw all this and did not complain, and the train started with the cattle in these vans, and the drover in a railway carriage. On arriving at the end of the journey it was found that the lid of one of the vans had for some unascertained cause been closed, and on opening it some of the cattle were found suffocated and others much injured. Those in the other van where the lid remained open arrived safe. The stipulation was considered by the court a "just and reasonable" condition.[48]

§ 119. *Conditions Not "Just and Reasonable."*—A contrary conclusion has been reached by the English courts regarding conditions of this character: That a railway company conveying cattle shall be exempt from liability for loss however occasioned;[49] that the company will not be accountable for the "loss," detention or damage of any package insufficiently or improperly packed;[50] that the company is to be free from all responsibility whatever;[51] that the carrier in the carriage of cattle "is to be free from all risk and responsibility with respect to any loss or damage arising

[48] Pardington v. South Wales R. Co., 1 H. & N. 392; 2 Jur. (N. S.) 1210 (1856).

[49] Rooth v. North Eastern R. Co., L. R. 2 Ex. 173 (1867).

[50] Simons v. Great Western R. Co., 18 C. B. 805 (1856); Garton v. Bristol &c. R. Co., 1 B. & S. 112 (1861).

[51] Gregory v. West Midland R. Co. 2 H. & C. 944 (1864).

in the loading or unloading, from suffocation or from being trampled upon, bruised or otherwise injured in the transit, from fire or from any other cause whatsoever;" [52] that the owner of cattle is to see to the efficiency of the wagons before his stock is placed therein, complaint to be made in writing to the company's officer before the wagon leaves the station;[53] that a railway company is to be free from any injury however caused to cattle carried by them in consequence of over-carriage, detention or delay, even though the rate charged for carriage is reduced the sum ordinarily demanded;[54] that a railroad company forwarding goods beyond its lines in vessels owned and employed by it should not be responsible for any default or negligence of the master or any of the officers or crews of the company's vessels.[55] A customer, on delivering some horses to be carried by a railway company, signed a ticket, on which was the following memorandum: "This ticket is issued, subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description, traveling upon the railway, or in their vehicles." This it was ruled was not a "just and reasonable" condition, and that the truck in which the horses were conveyed being defective, and the horses having in the course of the journey knocked a hole in it, by means of which they injured themselves, the company was liable.[56] An owner of some marble chimney pieces desired to send them to London. Messages and notes passed between him and the agent of the railway company, on the subject of the terms on which they were to be carried. The agent stated

[52] Gregory v. West Midland R. Co., *post*.

[53] Gregory v. West Midland R. Co., 2 H. & C. 944; 10 Jur. N. S. 243; 33 L. J. Exch. Ch. 155; 12 W. R. 528 (1864).

[54] Allday v. Great Western R. Co., 5 B. & S. 903; 11 Jur. (N. S.) 12 (1864).

[55] Doolan v. Directors &c. Midland R. Co., L. R. 2 App. Cas. 792 (1877).

[56] McManus v. Lancashire, &c. R. Co., 4 H. & N. 327; 5 Jur., (N. S.)

as a condition that the company would not be responsible for goods sent by the railway unless their value was declared, and they were insured, the rate of insurance being fixed at 10 per cent. on the declared value. After some delay the agent received a note requesting that the marbles might forthwith be sent to London, "not insured;" they were sent, and suffered damage. It was held by the House of Lords, reversing the decision of the lower court, that the condition thus sought to be imposed by the company was not "just and reasonable." [57] In an Irish case [58] a railway company had introduced into a special contract for the conveyance of horses at a low rate, a condition exempting themselves from all liability in respect to the horses, whether in the loading or unloading, or in transit and conveyance, or whilst in the company's vehicles or on their premises. The court decided that this was unjust and unreasonable, and could not be aided by an alternative condition, whereby the company offered to "undertake the risk of conveyance only, in consideration of an additional payment of 20 per cent. on the low rate of charge, but refused to entertain any claim for damage sustained by any animal conveyed at such additional rate, unless the injury was stated and pointed out to the company's agent at the time of unloading;" that condition also being unjust and unreasonable.

§ 120. *Conditions Sustained by the American Courts.*— In the United States a condition commonly inserted by common carriers in their contracts relates to the time and manner of presenting claims for damages; and the courts have been liberal in sustaining such regulations. In *Express Company v. Caldwell*,[59] it was held by the Supreme Court of the United States that a condition imposed by an express

651 (1859).

[57] Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473; 9 Jur. (N. S.) 914 (1862).

[58] Lloyd v. Waterford &c. R. Co. 15 Ir. C. L. (N. S.) 37 (1862).

[59] 21 Wall. 264 (1874).

company that it shall not be liable for any loss or damage to a package unless claim therefor shall be made within ninety days from the time of its receipt by the company, is lawful and binding, and is not unreasonable where the time for the transit of the package is only one day. The claim should be made within the ninety days, but suit may afterwards be brought at any time within the period of the statute of limitations. In a case decided by the Supreme Court of Alabama in 1870, a receipt given by an express company contained a condition that the company should not be liable for any loss, unless a claim therefor should be made within thirty days from the date of the receipt. In a suit against the company it appeared that the plaintiff was not aware of the loss of the goods until a year after the date of the receipt. It was held that the plaintiff was not bound by the limitation contained in the receipt. The court said: "He [the carrier] can not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud. Thirty days might elapse before the consignee became aware that anything had been consigned to him, especially if he was absent from home." [60] But in *Express Company v. Caldwell* this case was criticised. It is there said by Mr. Justice STRONG: "This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract." In sustaining a stipulation in these words: "The defendants shall not in any event be liable for any loss or damage unless the claim therefor shall be presented to them in writing at their said office within thirty days after the time when said property has or ought to have been delivered," SHARSWOOD, J., said: "This is a very reasonable and proper provision, to enable the defendants, while the matter is still fresh, to institute proper inquiries and furnish themselves with evidence on that subject. The defendants do a large

[60] Southern Express Co. v. Caperton, 44 Ala. 101 (1870).

business, and to allow suits to be brought against them without such notice at any length of time would be to surrender them bound hand and foot to almost every claim which might be made. It would be next to impossible where a thousand packages, large and small, are forwarded to them daily, to ascertain anything about the loss of one of them at a distance of six months or a year."[61] A condition that the carrier should not be liable for any loss unless a claim therefor should be presented within thirty days after the date of the receipt, was held by the Supreme Court of Indiana to be unreasonable and void in a contract to carry a valise from Indiana to Georgia, dated Jan. 24, 1865, during the civil war.[62] But in a subsequent case in the same State where a package of money was received by the Adams Express Company, at Pittsburgh, Pa., directed to a person at Jonesboro, Ind., the bill of lading stipulating that the company was not to be liable for any loss unless the claim therefor should be made in writing, at the office of shipment, within thirty days from the date of the receipt, and the complaint did not allege that the claim for such loss was made in writing within thirty days after the date of the contract, it was ruled that the stipulation that such claim should be made in writing within the time specified was reasonable; that in such a case as this it was not necessary to make the claim at the office of shipment, but it might be made upon some agent or officer of the company chargeable with the loss.[63] A condition in a bill of lading that all claims for damages should be made *before* the article was taken away from the station was held in a North Carolina case to be reasonable except as to latent defects.[64] A bill of lading contained the following clauses: "The articles named in this bill of lading shall be at the risk of the owner, shipper

[61] Weir v. Express Co., 5 Phila. 355 (1864), and see Southern Express Co. v. Hunnicutt, 54 Miss. 566 (1877).

[62] Adams Express Co. v. Reagan, 29 Ind. 21 (1867).

[63] United States Express Co. v. Harris, 51 Ind. 127 (1875).

[64] Capehart v. Seaboard &c. R. Co., 77 N. C. 355 (1877).

or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination; and they shall be received by the consignee thereof, package by package, as so delivered, and if not taken away the same day by him, they may, at the option of the steamer's agent, be sent to store, or permitted to lie where landed, at the expense and risk of the aforesaid owner, shipper or consignee." It was held that these clauses were not unreasonable, and that it was the duty of the consignees, having had due previous notice, to examine each bale as it left the vessel's tackles and was deposited on the wharf, and to see if it was their cotton; and that the duty of the vessel was discharged when the cotton was put on the dock.[65]

Where an express company gave a receipt for goods containing a clause exempting it "from any loss or damage whatever, unless claim should be made therefor within ninety days from the delivery to it," it was held that this clause had no application to a suit against the company for the non-delivery of the goods themselves—that not being a suit either for "loss" or "damage;"[66] and such a clause not being a condition precedent to a plaintiff's right to recover, but being rather in the nature of a limitation, can not, it has been said, be availed of upon trial, unless set up by the defendant in his answer.[67] In a New York case it was ruled that a reservation in an express company's contract that all claims for damages were to be presented at the New York office for settlement, did not make such presentation of them a condition precedent to the company's liability. Their readiness at that office went only in defence of interest and costs, and not to the cause of action.[68]

§ 121. *Unreasonable and Void Conditions.*—A stipulation that a claim for loss must be made at the time the goods are delivered will not protect the carrier where the

[65] The Santee, 2 Ben. 519 (1868).
[66] Porter v. Southern Express Co., 4 S. C. 135 (1872).
[67] Westcott v. Fargo, 61 N. Y. 542 (1875).
[68] Place v. Union Ex. Co., 2 Hilt. 19 (1858).

claim is made in a reasonable time after the loss is ascertained.[69] A regulation of a railroad company posted up in their depot, requiring all claims for damages to be made within ten days after delivery at the station is unreasonable, because more than ten days might elapse before a party knew of the loss of his property.[70] Of the same order is a regulation of a railroad company that before a consignee can obtain his wheat from the company's bins he shall receipt for the quantity,[71] and that a passenger on a steamboat shall not take into his state-room such baggage as he may require for his personal use.[72] In a Pennsylvania case it is said: "There can be no doubt that if a carrier were to attempt to provide either that all goods should be valued at a fixed sum independently of their real value, or demand an increased compensation in the form of insurance disproportioned to the increase of responsibility and risk, the attempt would be one which the law would discountenance and put down. The remedy of the owner would then be found either in summoning the carrier to accept the goods at the real value and subject to a reasonable charge, and mulcting him in damages if he refused, or in delivering them under protest and calling upon the courts for redress in case of loss."[73] But where the terms of the carrier's special acceptance are reasonable, the fact that the shipper agreed to it "under protest" is, it seems, not material.[74]

§ 122. *Regulations in the Transportation of Live Stock.* —In contracts for the carriage of live stock, stipulations that the carrier shall not be responsible for loss or injury to any one animal for more than a sum specified; that the owner shall bear the risk of loss or damage by reason of delay; and that the owner shall take the risk of injuries

[69] Memphis R. Co. v. Holloway, 4 L. & Eq. R. 425 (1877).
[70] Browning v. Long Island R. Co., 2 Daly, 117 (1867).
[71] Christian v. St. Paul &c. R. Co., 20 Minn. 21 (1873).
[72] Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 229 (1868).
[73] Newburger v. Express Co., 6 Phila. 174 (1866).
[74] Goggin v. Kansas &c. R. Co., 12 Kas. 416 (1874).

which the animals may receive "in consequence of heat, suffocation or of being crowded, or on account of being injured, whether such injury is caused by the burning of hay, straw, or any other material for feeding said animals or otherwise," have all been held valid and binding.[75] In a case in Alabama[76] a common carrier and the owner of live stock made a special contract, wherein it was agreed that in consideration of reduced rates and a free pass to the owner, the latter would attend the stock and care for it at his own expense, in case of accidents, and that the value at the time and place of shipment, not to exceed $50 per head for ordinary beef cattle, should be the measure of recovery for any loss for which the carrier might be liable. The contract was enforced by the Supreme Court as the measure of the carrier's liability, BRICKELL, C. J., saying: "We have had much difficulty in determining the validity of the stipulation. * * If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal and the amount of freight received we should not hesitate to declare it unjust and unreasonable. But as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged and to protect the carrier against exaggerated or fanciful valuations." MANNING, J., dissented, holding that in order to render such a condition reasonable the sum mentioned ought to be the maximum value of any one of the cattle, while in the case at bar it was but the average value.

A stipulation in a contract of shipment of live animals that no claim for loss or damage will be allowed unless the same is made "before or at the time the stock is unloaded," is reasonable.[77] The object of such a condition is to protect the company from false and fictitious claims by having the cattle inspected before they are removed or mixed with

[75] Squire v. New York Cent. R. Co., 98 Mass. 239 (1867).

[76] South &c. Alabama R. Co. v. Henlein, 52 Ala. 606 (1875).

[77] Goggin v. Kansas &c. R. Co., 12 Kas. 416 (1874); Rice v. Kansas &c. R. Co., 63 Mo. 314 (1876).

other cattle. But the phrase "before or at the time the stock is unloaded," is not limited to the identical moment; the notice need only be so immediate that its object may be attained.[78] In a recent case in Missouri a special contract for the shipment of cattle provided that no claim was to be allowed unless "the same is made in writing before or at the time the stock is unloaded." The cars were thrown from the track while the stock was in transit, and part of the stock injured. After being detained for some time the train proceeded to its destination, where it arrived at midnight. Before unloading the owner verbally notified the company's agent that he would not receive the cattle except under protest, and asserted his claim for damages. The agent made no objection to its form, but assured him that it was not necessary to go to the company's office that night. From that time he gave his entire attention to the stock; and in consequence of the unfitness of the stock yard and with the company's consent, the cattle were removed that night to the plaintiff's farm, several miles distant, where the company might have examined them. Three days later he gave a written notice of his claim to an officer of the company. It was held that the purpose of the condition had been complied with, viz.: an opportunity for the company to inspect the stock before they were mixed with others or slaughtered; that the contract of the company amounted to a waiver of the notice, and that the plaintiff was entitled to recover.[79]

[78] Goggin v. Kansas &c. R. Co., *supra*. In this case the contract provided that the shipper should accompany the cattle, and the court say: "Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany or superintend his stock; nor would it probably prevent a recovery for injuries sustained which could not readily be seen and actually should not be discovered until the time for giving the notice had expired."

[79] Rice v. Kansas &c. R. Co., 63 Mo. 314 (1876). The court here refer to the fact that the Kansas court in the Goggin case declared that the phrase, "before or at the time of unloading," does not mean that the notice must be at the identical moment, but so immediately that the object sought by the notice can be attained. Therefore the two decisions do

§ 123. *Means of Carrying Out Conditions Must be Provided.*— If a carrier give notice that he will not be liable unless certain conditions are complied with he must provide the means for obtaining the customer's compliance. Thus a regulation that the carrier will not be liable for the loss of baggage, unless the same has been checked, if it have any effect, will not prevent a person who gave his baggage to the carrier's agent and demanded a check, but failed to receive one, because the person whose duty it was to give them was not present, from recovering its value.[80]

§ 124. *Insurance.*— A carrier is not an insurer in the ordinary sense of the term, as he can not call on an insurance company that has insured goods lost while in his hands for contribution. His is not a contract of indemnity independent of the care and custody of the goods.[81] But he may make an agreement with the owner that in case of loss or damage to the goods for which he is liable, he shall have the benefit of any insurance effected by or on account of the owner.[82] Where an express company receipted for goods left to them to be forwarded by a particular vessel, and that vessel being withdrawn sent them by another which was lost, it was held that the company was liable for the loss; and the fact that the owner demanded and collected the insur-

not conflict. In the Goggin case the notice was not given for more than a year after the injury, and no excuse was shown except that at the time of unloading the plaintiff could not obtain writing materials. In a subsequent Missouri case (Oxley v. St. Louis &c. R. Co., 65 Mo. 629 (1877), it is said: "It may also be well to observe that this case is distinguishable from the case of Rice v. Kansas &c. R. Co., *supra*, in this that it was there agreed that no claim for damages should be allowed unless demand was made in writing 'at the time of or before' the stock was unloaded, whereas, in the case before us, it is simply provided that the claim for damages shall be made to the general freight agent in writing 'within three days' from the time the stock was unloaded. We are not prepared to say that the failure of the plaintiff to make this claim in the manner and within the time designated would on that accoun alone deprive him of his right of action."

[80] Freeman v. Newton, 3 E. D. Smith, 246 (1854).

[81] Gailes v. Hailman, 11 Pa. St. 515 (1849).

[82] Mercantile Ins. Co. v. Calebs, 20 N. Y. 173 (1859).

ance on a portion of the goods could not operate to relieve their liability.[83]

§ 125. *Usages and Customs.*— That custom or usage will control the general law of liability of carriers is shown by many cases;[84] but it is equally well settled that such a custom or usage to be binding must be general, reasonable and uniform, and known to the party sought to be bound by it;[85] a usage at one port will not be presumed to be the usage at another port.[86] Where the terms of a bill of lading have acquired by usage a particular signification, the parties will be presumed to have used them in that sense.[87] But the express agreement of the parties will overcome this; as for example the practice of lines of steamships to ship goods in a certain way will not control the terms of a contract specifying a different manner in which to ship them.[88] If carriers on a particular river sometimes gave bills of lading containing an exemption from loss by fire, and at other times containing no such exemption, such a usage is not established, because not uniform, and this although in a majority of cases the exception was contained in the bills of lading.[89] A car-

[83] Goodrich v. Thompson, 4 Robt. 75 (1866), affirmed 44 N. 324 (1871).

[84] McMasters v. Pennsylvania R. Co., 69 Pa. St. 374 (1871); Baxter v. Leland, Abb. Adm. 348 (1848); Gibson v. Culver, 17 Wend. 305 (1837); Garside v. Proprietors, 4 Term Rep. 581 (1792); Hyde v. Proprietors, 5 Id. 389 (1793); Van Santvoord v. St. John, 6 Hill, 157 (1843); Cope v. Cordova, 1 Rawle, 203 (1829). But in Schieffelin v. Harvey, Anth. 56 (1808), evidence was offered to show that according to the general understanding of merchants as soon as a custom house officer was put on board a ship the goods were at the risk of the shipper. Thompson, J.: "The testimony is inadmissible. The established principles of law can not be controlled by custom."

[85] "At most it was a usage recently established, and confined to the particular business of the defendant at a particular place, not known to the plaintiffs and which they were not bound to ascertain. The usage relied upon in this case lack the essential elements of a valid usage. It is neither general, established, uniform or notorious." Rawson v. Holland, 59 N. Y. 611 (1875).

[86] Bazin v. Steamship Co., 3 Wall. Jr. 229 (1857).

[87] Wayne v. The General Pike, 16 Ohio, 421 (1847).

[88] Bazin v. Steamship Co., 3 Wall. Jr. 229 (1857).

[89] Cooper v. Berry, 21 Ga. 526 (1857); Berry v. Cooper, 28 Ga. 543 (1859).

rier can not limit his liability by merely proving a usage on his part in giving bills of lading to exempt himself from certain classes of losses—that he in fact never did business on any other terms.[90] Thus where no receipt is given by the carrier, he can not limit his liability by showing that it was his custom to give receipts containing limitations, and that if a receipt had been given it would have been in the usual form.[91] So the fact that an express company commonly gave printed receipts containing certain conditions, for goods received, will not authorize the admission in evidence of such a receipt to limit their liability in a case where a mere written receipt was given which contained no limitation at all.[92] In a New York case[93] it is said that although a carrier can not vary the liability which attaches upon the receipt of goods for transportation without qualification, by the delivery of a subsequent bill of lading containing conditions, yet that this rule will be different if the parties have been in the habit of transacting their business in this way. It is held in Michigan and Illinois that the sending of goods under a restrictive contract in any number of instances does not bind the party sending them to a similar contract in the future, without his agreement to that ef-

[90] Illinois Cent. R. Co. v. Smyser, 38 Ill. 354 (1865). A custom not to sign bills of lading for looking-glasses without the words "not responsible for contents," can not be proved for the purpose of qualifying the liability of a carrier. "The law, and not such a custom, ascertains and limits the rights and liabilities of shippers and common carriers." The Pacific, 1 Deady, 17 (1861). A common carrier upon a canal can not, in the absence of an express contract, limit his liability by showing that by a custom on the canal carriers are not liable for losses resulting from the dangers of navigation, from fire or from inevitable accident. Coxe v. Heisley, 19 Pa. St. 243 (1852).

[91] Where a contract for the shipment of goods contained no exception as to loss by fire, although the usual bills of lading issued by the carrier did contain this provision, in an action for the price of the goods, the same having been destroyed by fire, a copy of such bills of lading is not evidence for the transporter. Clyde v. Graver, 54 Pa. St. 251 (1867).

[92] Southern Express Co v. Womack, 1 Heisk. 256 (1870).

[93] Shelton v. Merchants Dispatch Trans. Co., 36 N. Y. (S. C.) 527 (1873).

fect.[94] In a Massachusetts case it is said: "We do not mean to be understood as saying that such assent and acquiescence may not be shown by evidence drawn from a long and uniform course of dealing between parties, in connection with other circumstances leading to the inference that a notice of a restricted liability on the part of the carrier was recognized by the other party as constituting the agreement on which the contract of carriage was to be performed. But such dealing and recognition must be tantamount to a clear assent to the terms of the notice on the part of the owner and consignor, or it will fall short of establishing a limitation on the common law liability of the carrier." [95]

But though usage is sometimes admissible to add to or explain a contract, it is never allowed to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract.[96] Thus, where the master of a vessel received skins to be carried from New Orleans to New York, there to be delivered in good order, "dangers of the seas" excepted, and the skins were injured by rats, it was held that evidence of mercantile usage and understanding that injuries by rats are treated as "dangers of the sea" was not admissible.[97] In *The Reeside*,[98] Mr. Justice STORY refused to admit evidence of a custom among ship-owners that the exception of the "dangers of the seas" extended to all losses except those arising from their neglect. In discussing the question the learned judge said: "I own myself no friend to the al-

[94] McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867); Erie &c. Trans. Co. v. Dater, 8 Cent. L. J. 293 (1879).

[95] Bigelow, C. J., in Perry v. Thompson, 98 Mass. 249 (1867).

[96] Collender v. Dinsmore, 55 N. Y. 200 (1873).

[97] Aymar v. Astor, 6 Cow. (N. Y.) 266 (1826). But see Cap. VIII. "Dangers of Navigation."

[98] 2 Sum. 567 (1837). This ruling was approved by the Supreme Court of the United States in Garrison v. Memphis Ins. Co., 19 How. 312 (1856), where evidence to the effect that the words the "perils of the river" were according to the usages of navigation understood to include losses by accidental fire was held to have been properly rejected by the trial court.

most indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business or trade, to control, vary or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that of late years the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract can not be controlled, or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate declarations of the par-

ties. Now, what is the object of the present asserted usage or custom? It is to show, that, notwithstanding there is a written contract (the bill of lading), by which the owners have agreed to deliver the goods shipped in good order and condition, at Boston, the danger of the seas only excepted; yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is to substitute for the express terms of the bill of lading an implied agreement on the part of the owners that they shall not be bound to deliver the goods in good order and condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me that this is to supersede the positive agreement of the parties, and not to construe it."

In *Simmons v. Law*,[99] under a bill of lading for the carriage of treasure from San Francisco *via* the Isthmus to New York, by the fair construction of which the carrier was liable as such for the transportation across the Isthmus, evidence was held inadmissible in an action against the carrier for the loss of the goods on the Isthmus, to prove that it was the custom of shippers of treasure to insure it against risks upon the Isthmus; or that there was a custom, by which the carrier of gold refused to assume any risk of transportation on the Isthmus, or that the bills of lading then in use excepted all risks of land and river carriage on the Isthmus; or that the plaintiff had previously shipped treasure by this line, and knew of this custom when he made the shipment in question. But where a railroad com-

[99] 8 Bosw. 213 (1861); affirmed, 3 Keyes, 217 (1866). The bill of lading of gold delivered at San Francisco stated that it was shipped on the vessel at San Francisco, and that "on arrival at Panama the same is to be forwarded across the Isthmus, and to be re-shipped by one of the United States Mail Steamship Company's ships to New York, * * * * and to be delivered in like good order and condition at the port of New York, dangers of the seas, land carriage and river navigation, thieves and robbers excepted."

pany received goods addressed to a point beyond its terminus, and gave a bill of lading for the transportation of the goods to its terminus, it was held that parol evidence was admissible to prove that there was a custom in such cases to deliver to a connecting carrier, such evidence not tending to vary or contradict the bill of lading.[100]

[100] Hooper v. Chicago R. Co., 27 Wis. 81 (1870).

CHAPTER VI.

LIABILITY NOTWITHSTANDING CONTRACT — NEGLIGENCE.

SECTION.

126. The Degrees of Negligence.
127. Reasons for the Division.
128. Discordant Decisions.
129. Views of the English Judges.
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132. Power to Contract Against Negligence—In America.
133. Failure to Apprise Carrier of Value and Contents.
134. Contributory Negligence of Bailor.
135. The Rule in New York.
136. Discordant Decisions.
137. Other Cases in the Carriage of Live Stock.
138. Evidence of Negligence.

§ 126. *The Degrees of Negligence.*— Sir WILLIAM JONES in his essay on the Law of Bailments,[1] distinguishes between ordinary, gross and slight negligence thus: "Ordinary neglect is the omission of that care which every man of common prudence and capable of governing a family, takes of his own concerns. Gross neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property. Slight neglect is the omission of that diligence which all circumspect and thoughtful persons use in securing their own goods and chattels." Judge STORY gives in substance the same defini-

[1] Jones on Bailments, p. 118.

tion in these terms: "'Ordinary negligence may be defined to be the want of ordinary diligence, gross negligence to be the want of slight diligence, and slight negligence to be the want of great diligence;'" [2] and the editor of the later editions of the last work says in a note: "It can not be doubted that there are different degrees of negligence, though the dividing line between them may be narrow, and it may not always be easy to say on which side of the line a particular case may fall. It is possible that no uniform meaning has always been ascribed to to the words 'gross negligence,' and the term has sometimes been loosely applied to carriers for hire, whereas it is more correctly used in describing that degree of negligence for which a gratuitous bailee is responsible. But the existence of a practicable difference between the degrees of negligence lies at the foundation of the law of bailments." [3]

§ 127. *Reasons for the Division.*— It may properly be said that there are different degrees of negligence recognized by the law, simply because there exist different degrees of care, and that there exist different degrees of care only because there are different kinds of bailments. A bailment may be for the sole benefit of the bailor, as in the case of a person storing the goods of another on his premises without compensation. This is the *depositum* or naked bailment, or the *mandatum* of Lord HOLT, of which he says in *Coggs v. Bernard*:[4] "He is not answerable if they

[2] Story on Bailments, § 17. The terms used by the civil lawyers were *levis culpa*, *lata culpa and levissima culpa*.

[3] In Smith's Leading Cases (note to Coggs v. Bernard, 336), it is said: "Nearly all the confusion and obscurity which belong to the subject of bailments have been occasioned by the unfortunate introduction of the words 'gross' and 'slight' negligence, which do not belong to our law, and which convey no precise idea. The civil law distribution and classification of these liabilities is entirely different from ours; our law has conceived of the legal obligation and duties of men, in relation to their neighbor's property, and has, by this action on the case, defined them with so much comprehension and precision that the same principle applies irrespectively of the seat of the possession."

[4] Ld. Ray. 707.

are stolen without any fault in him; neither will a common neglect make him chargeable; but he must be guilty of some gross neglect;" or it may be for the sole benefit of the bailee, as in the case of a gratuitous loan, in which case the "borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable;" or lastly the benefit may be reciprocal, as in the case of goods to be used or worked for reward. In the first case the bailee was held to answer only for gross neglect; in the second for even slight neglect; in the third ordinary diligence only was required of him, and he was answerable simply for what was called ordinary neglect. This distinction was reasonable. It appeared not improper that one who had all the benefit of any transaction should carry the most risk, and that he who had possession of goods under other circumstances than these, should not be required to exercise more diligence than the common run of men exhibit in the transaction of their own affairs. But in this last class there was one occupation upon which was imposed an extraordinary and exceptional liability. The common carrier, though rendering service to his employer for hire, and therefore for this reason within the third class mentioned, was at a very early day placed upon another and a different footing, being in short, as has been seen,[5] held to answer for the goods intrusted to him at all events, "the act of God and the public enemy only excepted"—a rule in the absence of contract still adhered to in this country, on grounds of public convenience and public policy. Thus it seems clear that so far as common carriers are concerned, the division of negligence into degrees is improper and illogical, because wanting the reasons upon which the division has been founded.

§ 128. *Discordant Decisions.*—Notwithstanding this, there are decisions to be found in the reports of this country recognizing the degrees of negligence in the case of common

[5] *Ante*, Cap. I, § 3.

carriers and which seem to consider the question of their liability for breach of contract in certain cases as depending upon the particular kind of negligence with which they may be properly charged. In a case in the Supreme Court of Indiana in 1855,[6] the defendant had agreed to tow a flat-boat, the owners of the latter agreeing that it should be done at their risk. The boat having been sunk by the negligence of the defendant in towing at an improper speed, the court held that this was "gross negligence" and that he was therefore liable, and this ruling was cited with approval in a subsequent case.[7] In *Indiana Central Railroad Company v. Mundy*,[8] the indorsement on a free pass that the person receiving it agreed to assume all risk of personal injury and loss or damage while using it, was held not to exempt the company from the consequences of gross negligence. "Ordinary negligence" was subsequently spoken of in the same way by the same court.[9] In Illinois in an action against a railroad for damages for injuries to live stock, the court in discussing the evidence said: "If then, it was gross negligence in the conductor of the train carrying these hogs, in refusing to apply water to them when requested at Bloomington or at Normal, at which latter place water was abundant and convenient, the company could not contract against that;"[10] and the same view is taken in a case decided the year before.[11] Both these cases rest on an earlier one in which the question of the power of carriers of live stock to restrict their liability coming before the Supreme Court of Illinois for the first time, BREESE, J., laid down the rule in that State thus: "Railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, they still

[6] Wright v. Gaff, 6 Ind. 416.
[7] Indianapolis &c. R. Co. v. Remmy, 13 Ind. 518 (1859).
[8] 21 Ind. 48 (1863).
[9] Indianapolis &c. R. Co. v. Allen, 31 Ind. 394 (1869).
[10] Illinois Cent. R. Co. v. Adams, 42 Ill. 474 (1867).
[11] Adams Express Co. v. Haynes, 42 Ill. 89 (1866).

remaining liable for gross negligence or wilful misfeasance against which good morals and public policy forbid that they should be permitted to stipulate." [12] Most, if not all, of these cases have been since overruled,[13] but in New York the division thus attempted to be made is still preserved.[14]

§ 129. *Views of the English Judges.*—In a case decided in 1843, and which has often been cited with approval in subsequent cases,[15] ROLFE, B., said that he could see no difference between negligence and gross negligence, that the latter was the same thing as the former with the addition of a vituperative epithet. "Any negligence is gross," said WILLES, J., in *Lord v. Midland Railway Company*,[16] "in one who undertakes a duty and fails to perform it. The term gross negligence is applied to the case of a gratuitous bailee who is not liable unless he fails to exercise the degree of skill he possesses." In *Austin v. Manchester &c. Railway Company*,[17] CRESSWELL, J., said: "The term 'gross negligence' is found in many of the cases reported on the subject, and it is manifest that no uniform meaning has been ascribed to these words, which are correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire." In *Beal v. South Devon Railway Company*,[18] CROMPTON, J., defined the phrase gross negligence as the failure to exercise reasonable care, skill and diligence. And the remarks of ERLE, J., in *Cashill v.*

[12] Illinois Cent. R. Co. v. Morrison, 19 Ill. 136 (1857).

[13] See Michigan &c. R. Co. v. Heaton, 37 Ind. 448 (1871); Ohio &c. R. Co. v. Selby, 47 Ind. 471 (1874). See also *ante*, Cap. II, §§ 38, 39.

[14] French v. Buffalo &c. R. Co. 4 Keyes, 108, 2 Abb. App. 196 (1868); Wells v. New York Cent. R. Co., 24 N. Y. 181 (1862); Perkins v. New York Cent. R. Co., 24 N. Y. 196 (1862); Smith v. New York Cent. R. Co., 24 N. Y. 222 (1862); Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862); Poucher v. New York Cent. R. Co., 49 N. Y. 263 (1872).

[15] Wilson v. Brett, 11 M. & W. 113.

[16] L. R. 2 C. P. 340 (1867).

[17] 11 Eng. L. & Eq. 506 (1852).

[18] 5 H. & C. 337 (1864).

Wright,[19] are to the same effect. *Grill v. General Iron Screw Company*,[20] was an action on a bill of lading for the non-delivery of goods intrusted to the defendants, and which were lost in a collision. The bill of lading excepted the "perils of the sea," a term which is held to embrace an accidental collision. The plaintiff's replication averred that the loss was caused through the gross negligence of the defendants. On the trial, ERLE, C. J., left it to the jury to say whether the collision was caused by the negligence of the crew of the defendants. On a rule *nisi* for a new trial, on the ground that the judge ought to have instructed the jury to find whether or not the peril arose from gross negligence, WILLES, J., said: "No information, however, has been given as to the meaning to be attached to gross negligence in this case. * * * Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendants to use. A bailee is only required to use the ordinary care of a man and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description and not a definition, and it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in summing up." MONTAGUE SMITH, J., added: "I do not see what more he could have said except it was to use the very word gross, but it certainly would not have enlightened the jury to use an indefinite word without explaining it, and no different explanation has been suggested from that which his summing up in fact contained. The use of the term gross negligence is only one way of stating that less care is required in some cases

[19] 6 E. & B. 891 (1856).
[20] L. R. 1 C. P. 600 (1866).

than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." *Giblin v. McMullen*,[21] was a case against a bank as gratuitous bailees of a quantity of railroad debentures which were stolen by its servants. Lord Chancellor CHELMSFORD, while indorsing the expression of ROLFE, B., in *Wilson v. Brett*,[22] thought that the terms "gross, ordinary and slight" might be usefully retained as descriptive of the practical difference between the degrees of negligence for which different classes of bailees are responsible.

In *Hinton v. Dibbin*,[23] a case against a common carrier of goods, DENMAN, C. J., said: "When we find gross negligence made the criterion to determine the liability of a carrier who has given the usual notice, it might, perhaps, have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence any intelligible distinction exists." *Austin v. Manchester &c. Railway Company*,[24] was an action against a railroad company for injury to horses which it was transporting. By the contract between the carrier and the shipper the former was exempted from liability "however caused to horses or cattle." The declaration alleged that the defendants failed to take due and proper care to provide against friction of the wheels and axles of the carriages in which the horses were, but grossly and culpably neglecting to do so the wheels of the carriages took fire and the injury complained of was sustained. It was contended for the plaintiff that the exception from liability contained in the contract could not cover wilful misfeasance which was charged

[21] L. R. 2 P. C. 317 (1868).
[22] *Supra.*
[23] 2 Q. B. 646 (1842).
[24] 11 Eng. L. & Eq. 506 (1852).

in the declaration under the name of culpable and gross negligence. But the court held that the carrier was protected by the contract from the consequences of his negligence, and was therefore not liable. After citing the language of BAYLEY, B., in *Owen v. Burnett*:[25] "As for the cases of what is called gross negligence, which throws upon the carrier the responsibility from which, but for that, he would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of misfeasance,"[26] CRESSWELL, J., who delivered the opinion of the court, said: "Such certainly were the cases of delivery to the wrong person, sending by a wrong coach or carrying beyond the place to which the goods were consigned. But this observation will not explain all the decisions on the subject. There are others in which the carrier has been held liable for such negligence as warranted the court in holding that he had put off that character. But there is nothing in this declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods. The charge is that they ought to have taken precaution to guard against the consequences of friction of wheels and axles, and that they did not do so, and were guilty of gross negligence in not doing so. The terms 'gross negligence' and 'culpable negligence' can not alter the nature of the thing omitted, nor can they exaggerate such omission into an act of misfeasance or renunciation of the character in which they received the horses to be carried. The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damages however caused, to horses, &c. In the largest sense those words might exonerate the company from responsibility even for damage done wilfully, a sense in which it was not contended that they were used in this contract;

[25] 2 Cr. & M. 354 (1833).

[26] Negligence differs from misfeasance in this, that the former takes place in the performance of the contract, while the latter is done in direct contravention of it. Ang. on Car. sec. 12.

but giving them the most limited meaning, they must apply to all risks of whatever kind and however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of the wheel taking fire, owing to neglect to grease it. Whether this is called 'negligence' mrrely, or 'gross negligence' or 'culpable negligence' or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract, and that such exemption appearing on the face of the declaration no cause of action is declared."

§ 130. *The American Doctrine.*—The cases in which the distinction has been rejected in our own courts are too numerous to set out in this place, and it will therefore be sufficient to refer to the language of the Subreme Court of the United States in stating the American doctrine on this subject. It was said by that court as early as 1852: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'"[27] "The theory that there are three degrees of negligence described by the terms slight, ordinary and gross," says Mr. Justice CURTIS, in *The New World v. King*,[28] "has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the court has been forced to yield until there are so many real exceptions

[27] Philadelphia R. Co. v. King, 14 How. 468.
[28] 16 How. 469 (1853).

that the rules themselves can scarcely be said to have a general operation." Finally, in the great case of *Railroad Company v. Lockwood*,[29] Mr. Justice BRADLEY gave the opinion of the whole court in this language: "Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In such case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French civil code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.' Toullier, in his commentary on the code, regards this as a happy thought and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice. In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and dili-

[29] 17 Wall. 357 (1873).

gence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which in other words will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary." These authoritive utterances must effectually settle the question. The degrees of negligence should be spoken of no longer in the case of common carriers. The absence of care according to circumstances is sufficient to render them liable for breaches of duty, and the term "gross," if used at all can only be used as a "vituperative epithet." In this sense it may properly be used in cases involving the question of contributory negligence, and in cases where the question of exemplary damages may arise for determination. But in no other.

§ 131. *Power to Contract Against Negligence — In England.* — It has been seen that in England, until the passage of the Carrier's Act, carriers were allowed either by notice or contract to exclude all responsibility whatever[30] — a doctrine first announced by Lord ELLENBOROUGH in *Maving v. Todd*[31] and *Leeson v. Holt.*[32] In *Maving v. Todd* the carriers had given notice that their liability should not extend to a loss by fire. The plaintiffs counsel submitted that the defendants could not exclude their responsibility altogether, as this was going further than had been yet done in the case of carriers who had only limited their responsibility to a certain amount. Lord ELLENBOROUGH: "Since they can limit it to a particular sum, I think they may exclude it al-

[30] *Ante*, Cap. II, § 25.
[31] 1 Stark. 72 (1815).
[32] 1 Stark. 186 (1816).

together, and that they may say, we will have nothing to do with fire. They may make their own terms. I am sorry the law is so, it leads to very great negligence." In *Leeson v. Holt* the carriers had given notice that the goods would be entirely at the risk of the owners. Lord ELLENBOROUGH said: "If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two. It was found that the common law imposed upon carriers a liability of ruinous extent, and in consequence qualifications and limitations of that liability have been introduced from time to time till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice if a servant of the carriers had in the most wilful and wanton manner destroyed the furniture intrusted to him, the principals would not have been liable. If the parties in the present case have so contracted the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions."

§ 132. *Power to Contract Against Negligence — In America.*— In this country, on the other hand, though a common carrier may limit his liability as an insurer, he is not allowed to contract against the consequences of his own negligence or that of his servants or agents. This, though departed from in New York and West Virginia, is the American doctrine. For a fuller statement of this principle and the decisions made thereunder, the reader is referred to the second chapter of this book.[33]

§ 133. *Failure to Apprise Carrier of Value and Contents.* —But even in England it was required of common carriers if they sought to limit their liability for their own or their servants' negligence that the notice to that effect should be explicit; so that persons with whom they dealt could understand the conditions upon which the goods were received. Thus a notice that the carrier would not be answer-

[33] *Ante*, Cap. II, §§ 30-67.

able for parcels above the value of £5, unless an additional price was paid, was held not to release him from liability for the loss of a parcel of more than that value, on which the additional price was not paid, where such loss was occasioned by the gross negligence of himself or his servants.[34] In *Newborn v. Just*,[35] the defendant who kept an office for the purpose of receiving trunks to be conveyed by carriers to various places, was sued for the value of a trunk which had been delivered to him but had not been received at its destination. The declaration averred negligence. It was proved that there was a notice posted at the house stating that the defendant would not be answerable for goods over the value of £5 unless specially paid for, and it was admitted that the trunk and contents were worth more than that sum. The defendant relied on the notice. BEST, C. J.: "I don't think the notice will assist you; you are not in the situation of a carrier. You are not an insurer. The notice is to protect from insurance. But it has been decided over and over again that notice does not protect a carrier against negligence, and your client can only be liable for negligence." *Wilde*, Serjt.: "My client not being bound to receive parcels at all may by contract limit his responsibility." BEST, C. J.: "Then your client must give distinct notice to that effect; and if the public were told that he would not be liable either for negligence of himself or his servants, he would not have many persons trust him." The verdict went for the plaintiff. Similarly it has always been held in this country that a common carrier is liable for the value of the goods lost through his negligence, notwithstanding the bill of lading provides that he shall not be liable beyond an amount named therein, when the true value is

[34] Birkett v. Willan, 2 Barn. & Ald. 356 (1819); Beck v. Evans, 3 Camp. 268 (1812); Macklin v. Waterhouse, 5 Bing. 212, 2 M. & P. 319 (1828); Bodenham v. Bennett, 4 Price, 31 (1817); Riley v. Horne, 5 Bing. 217, 2 M. & P. 331 (1828); Gouger v. Jolly, Holt, 317 (1816); Kerr v. Willan, Holt, 643 (1817); Wyld v. Pickford, 8 M. & W. 443 (1841).

[35] 2 C. & P. 76 (1825).

not given or when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such agreements can at most only cover a loss arising from some cause other than the negligence or default of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted.[36]

§ 134. *Contributory Negligence of Bailor.* — But the omission to state the value of an article when called upon

[36] United States Express Company v. Bachman, 28 Ohio St. 144 (1875); Adams Express Co. v. Stettaners, 61 Ill. 184 (1871); New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344 (1848); Grace v. Adams, 100 Mass. 505 (1868); Davidson v. Graham, 2 Ohio St. 131 (1853); Graham v. Davis, 4 Id. 362 (1854); Judson v. Western R. Co., 6 Allen 485 (1863); Michigan &c. R. Co. v. Heaton, 37 Ind. 448 (1871); Lamb v. Camden R. Co., 46 N. Y. 271 (1872); American Express Co. v. Sands, 55 Pa. St. 140 (1867). Where there is an express stipulation limiting the responsibility of a carrier for baggage to a specified sum, this will not exempt the carrier from liability for the negligence or malfeasance of himself or his servants. Mobile &c. R. Co. v. Hopkins, 41 Ala. 486 (1868). Plaintiff delivered to an express company a package for transportation, and received a receipt providing that the company should not be liable for any loss or damage "to any box, package or other thing for over fifty dollars, unless the true value thereof is herein stated." It was held that this condition did not include a loss occasioned by the negligence of the company. Westcott v. Fargo, 61 N. Y, 542 (1875); Westcott v. Fargo, 63 Barb. 349, *s. c.*, 6 Lans. 319 (1872). Where an express company gave a freight receipt for eight boxes of boots and shoes with the stipulation "valued under fifty dollars unless otherwise herein stated:" *Held*, that the express company could not exonorate itself from liability for any neglect, by any such stipulation, even if it should be considered that the words of the receipt amounted to such a covenant; but to allow such a limitation in cases of gross neglect and conversion, would recognize their right to convert other people's property to their own use at their own price. Orndorff v. Adams Express Co., 3 Bush. 194 (1867). A clause in a contract between an express company and a shipper stated that goods shipped are of the value of $50, unless their value should be inserted in the contract, and that the company in case of loss would not be liable for more than $50, unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss. Kirby v. Adams Express Co., 2 Mo. (App.) 369, 3 Cent. L. J. 435 (1876).

by the bailee may amount to contributory negligence on the part of the bailor, and may be a bar to his action for the negligence of the carrier. In 1820, BAYLEY, J., remarked that in addition to securing a reward to the carrier in proportion to the risk which he undertook, notices requiring the disclosure of the contents and value of articles delivered for carriage might properly be said to have a further object, viz.: to enable the carrier to put parcels of the greatest value in a place of the greatest security. The value is a temptation to thieves to make attempts which but for that value they would not make. The omission to state the value may prevent the carrier from taking that care which in the case of property of extraordinary value he naturally would take. That may be negligence in the case of a package of large value which would be care in the case of a parcel of small value. This reasoning has been applied in recent cases. Thus it has been held by the Supreme Court of the United States that if an express company have a settled and uniform rule that money packages must be sealed and indorsed in a particular manner, and notice thereof is brought home to the consignor who neglects to comply with it, and the company, in ignorance of its special value, take only ordinary care of the package, it will not be liable for its loss.[37] In *Earnest v. Express Company*,[38] a small parcel containing four diamond rings was delivered to an express company, the owner who was aware of the regulation of the company as to additional charges on articles above the value of $50, refusing to state its contents. Packages of value were, according to custom, when received by the company placed in sealed pouches and these again in an iron safe; unvalued parcels were sometimes placed in a wooden box and sometimes thrown together upon the floor of the car. The plaintiff's package

[37] *Ante*, Cap. IV, § 86; Railroad Co. v. Manufacturing Co., 16 Wall. 318 (1872).

[38] 1 Woods, 573 (1873), and see St. John v. Express Co., 1 Woods, 612 (1871).

having been treated by the carrier as of the latter class was stolen. It was held that he was not entitled to recover beyond the fifty dollars.

§ 135. *The Rule in New York.*— While it is established in New York that common carriers may by special contract exempt themselves from liability for losses arising from the negligence of their servants or agents,[39] such a contract it has been again and again said can only be evidenced by plain and unmistakable language. Where a loss occasioned by the carelessness or negligence of a carrier or his agents or servants is not mentioned in terms in the contract, the law will not presume that a loss so occasioned was intended by the parties.[40] Thus where goods are sent at "owner's risk" the carrier will still be liable for any loss or damage occasioned by the negligence of himself or his servants,[41] and so where by the contract the carrier was released "from all claims, demands and liabilities of every kind whatever, for or on account of, or connected with, any damage or injury to or the loss of said stock or any portion thereof

[39] *Ante*, Cap. II, § 55.

[40] Knell v. United States &c. Steamship Co., 33 N. Y. (S. C.) 423 (1871); Keeney v. Grand Trunk R. Co., 59 Barb. 104 (1870).

[41] Moore v. Evans, 14 Barb. 524 (1852); Alexander v. Greene, 7 Hill, 533 (1844); Wells v. Steam Nav. Co., 8 N. Y. 375 (1853); Westcott v. Fargo, 63 Barb. 349 (1872); Wooden v. Austin, 51 Barb. 9 (1866). Printed notice put up on a boat that all baggage is at risk of the owners, although it is brought home to the owner, does not excuse the carrier from losses arising from the acts of himself or his servants, nor from actual negligence, nor the inefficiency of his machinery or vehicles, though it can not be discovered by the eye. Camden Railroad &c. Co. v. Burke, 13 Wend. 611 (1835). "It is clear, therefore, that the same care and diligence which would excuse the carriers in case of accident to passengers would not excuse them in case of damage to or loss of goods. In the case of *passengers* the carriers are responsible only for negligence, but in respect of their *baggage* they are responsible as common carriers, and accident is no excuse." The court said that the notice excused the carriers from losses happening by means of the conduct of others, from robbery or larceny, but not from such losses as arose from the acts of themselves or their servants. Hollister v. Nowlen, 19 Wend. 234, (1838); Cole v. Goodwin, Id. 251 (1838).

from whatever cause arising;" [42] and an agreement between a carrier of persons and a passenger, providing that the latter shall take "the risk of injury from whatever cause," does not exempt the carrier from liability for the want of ordinary care.[43] Other examples might be given where the same rule has been applied, although the language used seems broad enough to cover negligence; as "at the risk of the master or owners" [44] or "damage or loss to any article by fire." [45]

§ 136. *Discordant Decisions.*—Two late cases in that State entirely ignore the rule thus laid down. In *Cragin v. New York Central Railroad Company*,[46] the defendant contracted to carry a car load of hogs from Buffalo to Albany, under an agreement whereby the shipper assumed the risks of injuries from "heat, suffocation, &c." The hogs died from the effects of heat, the result of the negligence of the defendant's servants in not watering them and cooling them by wetting. The Commission of Appeals held that the defendants, as common carriers of cattle, were not insurers of them against the consequences of their own vitality. In the absence of any restrictive contract, if the defendants provided proper cars and exercised reasonable care, they were not responsible for such of the animals as might perish from heat. Therefore the limitation was unnecessary.

[42] Mynard v. Syracuse &c. R. Co., 71 N. Y. 180 (1877), reversing 7 Hun, 399 (1876).

[43] Smith v. New York Cent. R. Co., 29 Barb. 132 (1859). Compare Boswell v. Hudson &c. R. Co., 5 Bosw. 699, *s. c.*, 10 Abb. Pr. 442 (1860).

[44] Alexander v. Greene, 7 Hill, 533 (1844).

[45] The plaintiff shipped goods over the road of the defendant; by a clause in the bill of lading the defendant was released from liability "from damage or loss to any article by fire." The goods were lost by fire communicated by sparks which caught from an engine on the train on which the goods were carried. It was held that the defendant was liable for loss arising from fire caused by its negligence or that of its servants, whether the negligence was slight or gross, and that if the fire originated in defects of the machinery of the defendant, the defendant was liable for the loss. Steinweg v. Erie R. Co., 43 N. Y., 123 (1870).

[46] 51 N. Y. 61 (1872).

"If it be held," said EARL, C., "that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on its part, then it gets nothing; for in such case, without the stipulation it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence in consequence of which the hogs died from heat." In *Nicholas v. New York Central &c. Railroad Company*,[47] the plaintiff shipped by the defendant's road, in the month of March, a quantity of fruit trees, to be transported from New York to Geneva. At the time of shipment he executed a release to defendant from liability for loss or "damage to perishable property of all kinds, occasioned by delays from any cause, or change of weather, or loss or injury by fire or water, heat or cold." The release was construed by the Supreme Court to relieve the defendant from liability for a loss by freezing occasioned by the negligence of the defendant's servants. The *Cragin* case was indorsed, and its reasoning followed. Cold, against which the carrier could not guard, was the "act of God," for which, at common law, he was not responsible. Again it is said that "to give any force to the terms in the release" the risk of the carrier's negligently exposing the goods to the cold must be incorporated in the release. In the Court of Appeals this ruling, it is understood, has been recently affirmed by a divided court, but the case has not yet been officially reported. Of both these decisions it may be said that they are without the support of a single American or English precedent and are opposed to all the previous adjudications in the State where they were made. For a loss occasioned by the act of God or the public enemy a carrier is still liable if it be brought about by his own negligence. But if these rulings are correct, the simple fact that the bill of lading or other contract sets out these exemptions, is sufficient to excuse the bailee for a negligent loss of this description; yet no

[47] 6 Thomp. & C. 606, *s. c.*, 4 Hun, 327 (1875).

case can be found in the books which contains even a hint of such a doctrine.

§ 137. *Other Cases in the Carriage of Live Stock.*— In nearly all the States carriers of live stock are held to be liable as common carriers and to be insurers to the same extent as when engaged in the transportation of general merchandise, except as to injuries caused by the animals to themselves and to each other. But even where the rule is different they are still held to the exercise of proper care.[48] In Ohio and Kentucky a railroad company acting as a carrier of live stock can not contract for exemption from responsibility for loss arising by its own neglect of duties incident to such employment.[49] A special contract devolving on the owner the personal care of the cattle, with the risk of their escaping or being injured through their own restiveness or viciousness, does not exonorate the company from responsibility for damages resulting from a failure to provide a safe car for their transportation.[50] In Michigan where carriers of animals are not regarded as common carriers, unless they have specially agreed to be liable as such, a contract for the carriage of live stock exempting the carrier for losses "in loading, unloading, conveyance and otherwise, whether arising from negligence or otherwise," does not exempt him from a loss caused by defective cars.[51] In Wisconsin a carrier of live stock is not a common carrier to the full extent, and may exempt himself from liability for damage to them during transportation *from any cause.*[52] In an Indiana case a contract for the carriage of live stock provided that the shipper was to bear all loss by their "escaping." Several of the hogs escaped through an open

[48] See *ante*, Cap. I, § 16.

[49] Welsh v. Pittsburgh &c. R. Co., 10 Ohio St. 65 (1859); Adams Ex. Co. v. Nock, 2 Duv. 562 (1866); Louisville &c. R. Co. v. Hedger, 9 Bush. 645 (1873).

[50] Rhodes v. Louisville &c. R. Co. 9 Bush. 688 (1873).

[51] Hawkins v. Great Western R. Co., 17 Mich. 57 ((1868); Great Western R. Co. v. Hawkins, 18 Mich. 427 (1869).

[52] Betts v. Farmers Loan &c. Co., 21 Wis. 80 (1866).

window in the car, and it appeared that after only one had escaped the agent of the shipper told the conductor of the train to fix the window, which request he failed to comply with. The carrier was held liable.[53] In a New York case the owner of cattle transported on a railroad assumed all risk of injury to them "from delays, or in consequence of heat or the ill effects of being crowded in the cars," and he agreed to load and unload them at his own risk, the railroad company to furnish the necessary laborers to assist. An agent of the owner was to ride free and take charge of the cattle. The train carrying the cattle was detained at an intermediate station three days by a snow storm, during which the trains could not be moved with safety. The cattle could have been unloaded by building a platform for the purpose, but this the agent of the company refused to do. In consequence of the delay some of the cattle died and others were injured. The court held that under this contract the company was only bound to transport the cattle in a proper car, safely and with reasonable dispatch. Whatever was required to prevent injuries from unavoidable delays was to be done by the owner or his agent in charge. The court was of opinion that the provision for unloading referred to the terminus and not to an intermediate station; and that as the injury was caused by the neglect of the owner's agent to unload the cattle the company was not liable.[54] There is an odd expression of judicial opinion in a New Hampshire case,[55] where it is said by DOE, J., that "sending live cattle or allowing them to be sent by a railroad in cars loaded in the usual manner, is not an exercise of a high degree of care for the safety and welfare of the animals. It may be, financially, a judicious thing for the owner to do. His profits may exceed his losses, but there is a degree of negligence, not to say cruelty, on the part of

[53] Indianapolis &c. R. Co. v. Allen, 31 Ind. 394 (1869).

[54] Penn v. Buffalo R. Co., 49 N. Y. 204 (1872), Peckham, J., dissenting.

[55] Rixford v. Smith, 52 N. H. 355 (1872).

the owner in such a transaction, against which the carrier is not required to insure him." The learned judge had he not overlooked the fact might have added that killing live cattle, or suffering them to be killed for food in the usual manner, is "not an exercise of a high degree of care for the safety and welfare of the animals."

§ 138. *Evidence of Negligence.* — Where goods never reach their destination and the carrier can give no account of them, this is proof of negligence;[56] so where goods are lost or injured while in the custody of the carrier under a special contract, and he gives no account of how it occurred, a presumption of negligence is of course.[57] The fact that a carrier has received a trunk belonging to a passenger and has not delivered it to him nor accounted for it at the end of the voyage, will sustain a finding that the trunk was lost by the gross negligence of the carrier.[58] Where a receipt given by a carrier contained the words "valued under $150, unless herein otherwise stated," it was held that a demand for the goods at the point of destination and non-compliance with the demand by the carrier, without explanation or apology, was *prima facie* evidence of fraud or gross negligence; but that the recovery must be reduced to $149.99.[59] Under a bill of lading which exempts a vessel from damage caused by "any neglect of the pilot, master or mariners," or "resulting from stowage or contact with other goods, for leakage, breakage, damage caused by heavy weather, or pitching or rolling of the vessel, or defective packages," or "arising through insufficiency of strength of packages," it is responsible for cargo not delivered and not accounted for.[60]

[56] Riley v, Horne, 5 Bing. 217 (1828); Westcott v. Fargo, 6 Lans. 319, *s. c.*, 63 Barb. 349 (1872); Westcott v. Fargo, 61 N. Y. 542 (1875); Adams Express Co. v. Stettaners, 61 Ill. 184 (1871); Drew v. Red Line Transit Co., 3 Mo. (App.) 495 (1877).

[57] Ibid; American Express Co. v. Sands, 55 Pa. St. 140 (1867).

[58] Steers v. Liverpool &c. Steamship Co., 57 N. Y. 1 (1874).

[59] Newstadt v. Adams, 5 Duer, 43 (1855).

[60] The Bellona, 4 Ben. 503 (1871).

The want of suitable vehicles is negligence on the part of the carrier;[61] and it has also been held that the failure of a railroad company to provide cars with the safest and most improved platforms will amount to negligence on its part.[62] As from the simple fact of the occurrence of fire no inference of negligence can properly be drawn;[63] the fact of the burning of a ship, and the fact that the witnesses can not account for the origin of the fire, do not in point of law absolutely establish negligence on the part of the carrier; they are only competent to found an inference of want of care.[64] Where a railroad company agreed to transport a van partly on its own road and partly on the road of another company, and the van proved to be too high to pass on the road of the other company, whereby there was some delay occasioned, it was held that the contracting company was not shown to have been guilty of negligence, as it was not shown that its servants knew that the van was too high to pass on the other road.[65] Under an agreement with a railroad company for the carriage of goods exempting the company from liability for any loss or damage not caused by its negligence or that of its servants, it is not sufficient proof of negligence to show that certain cars belonging to the company became detached from each other, without showing the cause of the occurrence.[66] In an English case a cow was put into a truck belonging to the defendant, and on arriving at the place of destination was brought to a siding by defendant's yard for the purpose of being unloaded. The porter in charge of the yard, though warned not to do so by the plaintiff, unfastened the truck and let her out, and she was killed by a car. The plaintiff had signed a contract

[61] Sager v. Portsmouth &c. R. Co. 31 Me. 228 (1850).

[62] Boskowitz v. Adams Express Co., 5 Cent. L. J. 58 (1877); Boskowitz v. Adams Express Co. 9 Cent. L. J. 389 (1879).

[63] Thompson's Leading Cases on Negligence, p. 148.

[64] Cochran v. Dinsmore, 49 N. Y. 249 (1872).

[65] Webb v. Railway Co., 26 W. R. 70 (1877).

[66] French v. Buffalo &c. R. Co., 4 Keyes 108, 2 Abb. App. Dec. 196 (1868).

agreeing that the defendant should not be liable for any loss or injury to the cow in the delivery, if such damage should be occasioned by kicking, plunging or restiveness. The Court of Queen's Bench held the defendant liable.[67] In *Frank v. Adams Express Company*,[68] a carrier, who by the terms of his contract to carry a draft was relieved from liability as an insurer, was held to have used proper diligence and foresight in placing the draft in a safe while carrying it upon a steamboat, although upon opening the safe, after a fire which had destroyed the boat, the contents of the safe were found to be in ashes.

Where a carrier is sued for not delivering goods in proper condition under a bill of lading containing the clause "not accountable for rust or breakage," evidence that similar goods carried to the same place usually arrived safe and uninjured is admissible to show negligence on his part, and *eo converso*, the fact that such goods usually arrived in a damaged and broken condition is admissible, as tending to show that the breakage was not the result of negligence on his part.[69]

[67] Gill v. Manchester &c. R. Co., L. R. 8 Q. B. 186 (1873).
[68] 18 La. Ann. 279 (1866).
[69] Steele v. Townsend, 37 Ala. 247 (1861).

CHAPTER VII.

LIABILITY NOTWITHSTANDING CONTRACT — DEVIATION, DELAY, ETC.

SECTION.

139. Effect of Deviation From Terms of Contract.
140. Contract to Forward by Particular Vessel.
141. Exceptions in Contract Lost by Deviation.
142. Deviation by Connecting Carrier.
143. Consent of Shipper.
144. Failure to Obey Regulations.
145. Liability for Loss Caused by Delay.
146. Contracts Concerning Delay Construed.
147. Contracts to Deliver in Specified Time — Penalty.
148. Abandonment of Contract — Malfeasance.

§ 139. *Effect of Deviation From Terms of Contract.*— As was seen in the introductory chapter, if a carrier deviate from his route without necessity or reasonable cause and a loss ensue, which had he not departed from his course he would not have been responsible for, he will nevertheless be bound—his wrongful act being considered as the proximate cause of the disaster.[1] This is an elementary rule governing the liabilities of common carriers independent of contract. But it is likewise well settled that by deviating from the manner of the carriage the carrier loses the benefit of any exemption in his contract,[2] as where he agrees to ship

[1] *Ante*, Cap. I, § 10.
[2] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871).

by a sailing vessel and ships by steam,[3] or where he agrees to carry the goods "all rail" and takes them by sea or in any other mode even for a few miles.[4] The rule is that if he attempt to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods and can not avail himself of any exceptions made in his behalf in the contract.[5]

§ 140. *Contract to Forward by Particular Vessel.*— In the absence of evidence of a general custom controlling bills of lading in respect to the style and manner of shipment, it must be assumed that if the name of a vessel is inserted in the bill, it is because the owner designates her as the proper one to take the goods, having regard to the voyage and time of sailing; and the party issuing the bill can not send the goods by a vessel other than that named therein without assuming the whole risk of loss or damage to the goods while on such vessel.[6] The case of *Bazin v. Steamship Company*,[7] which is an authority on this point, was somewhat peculiar in its facts. In this case the defendants' agent at Havre issued a bill of lading containing the following clause: "Received in and upon the steamship called Shamrock, now lying in the port of Havre and bound for Liverpool, eighteen cases of merchandise to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship, City of Manchester, or other steam-

[3] Merrick v. Webster, 3 Mich. 268 (1854).

[4] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871); Bostwick v. Baltimore &c. R. Co., 45 N. Y. 712 (1871).

[5] Dunseth v. Wade, 3 Ill. 285 (1840). "The skill and experience of the master of the boat, the character of the crew and the staunchness and speed of the boat, may all be taken into consideration by the owner or shipper of goods in selecting a boat for the carriage of his goods. Having done so, he has a right to require that the contract be fulfilled in the manner agreed, unless the master of the boat reserves the privilege of re-shipping." Dunseth v. Wade *supra*. See further *post*, Cap. VIII. "Privilege of Re-Shipping."

[6] Goddard v. Mallory, 52 Barb. 87 (1868).

[7] 3 Wall. Jr. 229 (1857).

ship appointed to sail for Philadelphia on Wednesday the sixth day of September, and failing shipment by her, then by the first steamship sailing after that date for Philadelphia." The bill of lading excepted loss by "accidents of the seas." Another of the defendant's steamships, the City of Philadelphia, was to sail from Liverpool to Philadelphia on the 30th of August, and it happened that the cases of merchandise unexpectedly arrived at the former port before that day, and therefore the defendant shipped a portion of the cases on the City of Philadelphia, reserving the remainder for the City of Manchester. The goods sent by the latter steamship arrived at Philadelphia in due season and in good order, but those sent by the former were, on account of the wreck of the City of Philadelphia, lost. In an action to recover the value of the goods lost the defendants contended that they were not bound to detain goods in order to await the sailing of a particular vessel, and they also endeavored to establish a usage among steamship companies to ship goods as soon as possible after their receipt. But the defendants were held liable. Mr. Justice GRIER, by whom the case was decided, was of opinion that it was not necessary that the plaintiff should show a reason why he had mentioned the particular vessel. Reason or no reason he had a right to have his contract fulfilled according to its stipulations, and the result showed that if it had been so performed the goods would have arrived safely. If the goods had been sent by the City of Manchester the plaintiff would have been obliged to bear the risks excepted by the bill of lading. But the carrier, by changing the vessel and time, had substituted different risks from those stipulated for by the parties. The plaintiff's loss was the result of the defendants' breach of contract.

§ 141. *Exceptions in Contract Lost by Deviation.*—Where a bill of lading contains an exception of "dangers of the sea," the benefit of the exception will be lost by a deviation from the usual route by the vessel giving the bill of lading, unless the deviation is made through reasonable necessity

which is a question of law to be decided by the court.[8] In a case in Pennsylvania a carrier had a contract to carry goods to their destination "*via* the Chesapeake and Delaware Canal." On arriving at the canal he was told that the locks were out of order, and that he could not pass, upon which he undertook to go around by sea, but when on the sea his boat was sunk by a gale, and it and the goods were lost. The bill of lading contained an exception of "the dangers of navigation." It was held that the carrier was liable, as the exception was only intended to apply to the voyage on the canal, from which the vessel had deviated.[9] So if a carrier undertake to deliver goods the "dangers of the river excepted," with privilege of reshipping at a particular point, and he stop short of that point and the goods be there lost in a storm, he will be responsible.[10] Where goods were delivered to a carrier at Worcester, Mass., to be taken to Muscatine, Iowa, the bill of lading, which excepted liability from loss from fire, containing the following heading, "Merchants Despatch Transportation Company, Fast Freight Line from Boston, Albany and all New England Points to the West, Northwest and Southeast, *through without transfer* in cars owned and controlled by the company," and the goods on their arrival at Chicago were transferred to a warehouse, where the same evening they were burned in the great fire, it was held that the carrier could not avail itself of the exemption.[11]

§ 142. *Deviation by Connecting Carrier.*—A contract by the first of several carriers on a route to forward goods by railroad in good order, to the terminus of the whole route, at a stipulated price, is an entirety. If at the end of his own line, he changes their route by delivering them to a

[8] Crosby v. Fitch, 12 Conn. 410 (1838); Read v. Spaulding, 5 Bosw. 395 (1859), affirmed 30 N. Y. 630 (1864).

[9] Hand v. Baynes, 4 Whart 204 (1838).

[10] Cassilay v. Young, 4 B. Mon. 265 (1843).

[11] Stewart v. Merchants Dispatch Trans. Co., 47 Iowa, 229 (1877); Robinson v. Merchants Dispatch Trans. Co., 45 Iowa, 470 (1877).

second carrier to go by steamboat, he assumes the risk of transportation and is liable for any loss or damage in the subsequent transit, notwithstanding a stipulation that he shall not be responsible for any damage if received in good order at the end of his own line.[12] Where an express company have agreed to forward goods by a particular vessel, and that vessel does not go, they have no right to forward the goods by any other usual and proper mode of conveyance. It is their duty to notify the owners and await their instructions.[13] In *Johnson v. New York Central Railroad Company*, plaintiffs sent by the defendants to Albany, goods consigned to a person in New York, with directions to defendants to forward from Albany. Appended to the freight way-bill was a memorandum "*via* People's Line" of steamboats. On arrival at Albany the People's Line refused to take the freight. In the Supreme Court it was held that defendants thereby became warehousemen and forwarders, and navigation being about to close, they only discharged their duty by shipping by another line, which was responsible and in good reputation, and were not liable for a loss of the goods on the passage to New York by the perils of navigation.[14] On appeal to the Court of Appeals this ruling was reversed. "The defendant" said that court, "was clearly liable. On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff and awaited further instructions, or it should have relieved itself from liability by depositing the hemp for safe keeping in a suitable warehouse." [15]

§ 143. *Consent of Shipper.*— It would of course be different if the consent of the customer were obtained to the alteration in the manner of the performance. Thus in a Louisiana case a shipper of goods took a bill of lading from

[12] Fatman v. Cincinnati &c. R. Co., 2 Disney, 248 (1858).
[13] Goodrich v. Thompson, 4 Rob. 75 (1866), 44 N. Y. 324 (1871).
[14] 31 Barb. 196 (1857).
[15] Johnson v. New York Central R. Co., 33 N. Y. 610 (1865).

one vessel, but consented to the sending of his goods by another of the same line. The goods being captured and destroyed by a hostile cruiser while on the voyage it was held that the owners of the line were not liable for the loss.[16]

In an earlier case in New Hampshire,[17] A agreed to transport salt for B in a boat, B telling him that he must carry the salt as far as he could by water and then land it in the most convenient place. A carried the salt as far as H, where finding that the river was frozen he landed it, leaving it in the care of two boatmen, and sending word to B where the salt was. The next night the river was so obstructed with ice that the current changed and a part of the salt was swept away and lost. The court held the carrier liable, on the ground that B had not accepted the salt where it was landed.—The authority of this case is somewhat doubtful. It might have been the duty of the carrier to keep the salt on the boat; but the decision is not based on that ground, but solely on the ground of non-acceptance, the court saying that the agreement of B to accept the salt was not tantamount to an actual acceptance.

§ 144. *Failure to Obey Regulations.*— Where by contract with a carrier on a canal the goods were to be delivered within a certain time in good order, "the dangers of the navigation, from leakage and all other unavoidable accidents excepted," it was held that it was the duty of the carrier to proceed according to public regulations, and that he was liable for a loss arising from the bilging of his boat while lying for the night on a lock, contrary to the rules of the canal, although there was evidence of frequent user of locks for such a purpose.[18]

§ 145. *Liability for Loss Caused by Delay.*— In the absence of special contract, the decisions are conflicting as to the liability of the carrier for a loss by the act of God oc-

[16] Hendricks v. The Morning Star, 18 La. Ann. 353 (1866).

[17] Harris v. Rand, 4 N. H. 259 (1827).

[18] Atwood v Reliance Trans. Co., 9 Watts, 87 (1839), and see Hand v. Baynes, 4 Whart. 204 (1838).

curring after a negligent delay on his part.[19] In a rather novel case in Nebraska,[20] a railroad train, running three quarters of an hour behind time, was upset by a gust of wind, and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if it had been running on time. It was held that the negligence of the company in running behind time was not the proximate cause of the injury, but the court said that if it had been the case of a common carrier of goods the rule would have been different. It is nevertheless well settled in several States that such negligence is not the proximate cause of the loss and that the carrier is therefore not liable.[21] In the case of an express contract a similar discordancy exists. In New York where a bill of lading exempted the carrier from responsibility for loss by fire, and he delayed for an unreasonable length of time to deliver the goods to a connecting line, and the goods were burnt in the warehouse of the former, it was held that the exemption in the bill of lading did not absolve the carrier from liability for the loss.[22] On the other hand in *Hoadley v. Northern Transportation Company*,[23] the plaintiff delivered to a carrier goods to be forwarded, and received a bill of lading exempting the carrier from all liability for loss or damage by fire while in transit, or while in depots or warehouses or places of transhipment, and providing that it should be conclusive evidence of assent to its terms. The carrier negligently delayed to forward the goods, and they were burnt at the place of delivery in its custody. The court held that the carrier was not liable for the loss. The court said: "It is plain that the destruction of goods by fire in the calamity which happened could not reasonably be anticipated as a consequence of the wrongful detention of them

[19] *Ante*, Cap. I. § 10.
[20] McClary v. Sioux City &c. R. Co., 3 Neb. 44 (1873).
[21] *Ante*, Cap. I., § 10.
[22] Rawson v. Holland, 59 N. Y. 611 (1875).
[23] 115 Mass. 304 (1874).

on the wharf. The delay did not destroy the property, and there was no connection between the fire and the detention."

§ 146. *Contracts Concerning Delay Construed.*— A delay not explained will not be taken to be "unavoidable" where the bill of lading excepts "unavoidable delay." A transportation company received goods in New York on the 10th of November, which they agreed to deliver in Racine, the owner assuming the risk of loss by lake navigation and damage by unavoidable or accidental delay, and the goods did not reach Buffalo until the 22d or 23d and were lost on the lake a few hours after leaving Buffalo, by wreck. The court held that the delay in transporting the goods to Buffalo, the usual time for the transit being only three days, was, in view of increased danger of lake navigation as winter approached, *prima facie* proof of negligence, and cast upon the company the burden of showing that the delay was fairly within the exception of the contract.[24] In the common stipulation on railroad tickets that the company shall not be liable for any delay in the starting or arrival of trains, arising from accident or other cause, the words "other cause" mean "other cause in the nature of accident," and not "any cause whatever."[25] An agreement as to live stock excepting "risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from or in the loading or unloading the stock," is held to apply to losses from delays in loading or unloading and to have no reference to other losses which the delays of the carrier may cause to the owner.[26] The clause in a receipt that the carrier shall not be liable for damage or loss to the goods beyond a certain amount does not apply in a suit against a carrier for damages for delay in transporting the goods.[27]

[24] Falvey v. Northern &c. Co., 15 Wis. 129 (1862).

[25] Buckmaster v. Great Eastern R. Co., 23 L. T. (N. S.) 471 (1870).

[26] Sisson v. Cleveland &c. R. Co., 14 Mich. 489 (1866).

[27] Vrooman v. American &c. Express Co., 5 N. Y. (S. C.) 22, *s. c.*, 2 Hun, 512 (1874).

§ 147. *Contracts to Deliver in Specified Time—Penalty.* —In the stipulation of a bill of lading to deliver goods within a specified time, "in good order, the dangers of the railroad, fire and other unavoidable accidents excepted," the exception relates exclusively to the condition of the goods, and the carrier is not excused from his obligation to deliver within the time by showing that the delay was caused by unavoidable accident.[28] Where the contract specifies the time and fixes the rate of damages for delay, such damages are not the whole extent of liability where there is injury by reason of delay. Thus in *Place v. Union Express Company*,[29] expressmen, who were common carriers, stipulated to pay a certain sum *per diem* for delay in delivery of fruit beyond a time specified, exempting themselves from liability for casualties beyond their control, and for injury to the freight during the course of transportation occasioned by the weather, accidental delays or by natural tendency to decay, and providing that their "guaranty of special dispatch" should not cover extraordinary cases; there was such delay, and the goods, which were perishable, were greatly injured. It was held that the expressmen were liable for the injury to the fruit growing out of the neglect, as the stipulation did not limit the liability, but was intended to apply where the property was delivered uninjured, but after the contract time. An agreement to transport goods and deliver them, with a provision that the carrier shall pay a fixed sum for each day's delay after the time specified for the delivery, is an unconditional agreement to deliver the goods, and is not an agreement to deliver or pay the sum specified.[30] Where

[28] Harmony v. Bingham, 1 Duer, 209 (1854), affirmed 12 N. Y. 99 (1854). In this case the bill of lading acknowledged the receipt, in good order, of the property, with a promise to deliver in like good order, "damages of the railroad, fire, leakage and all unavoidable accidents," excepted. The written contract, pursuant to which the goods were sent and the receipt given, provided that the carrier should deliver them within a certain time.

[29] 2 Hilt. 19 (1858)

[30] A carrier agreed to transport goods from New York to Missouri in a

a carrier stipulated against liability for detentions beyond his control, the evidence showed an inability in a railroad employed by him to deliver freight as fast as it was received, which inability was not of sudden development or temporary duration, and was known to the carrier. It was held that in such a contract, made with knowledge of these facts, to deliver within a certain time, the delay so occasioned was not excused.[31]

§ 148. *Abandonment of Contract — Malfeasance.* — The carrier is likewise made liable for the goods intrusted to his care, and prevented from availing himself of the exceptions in his contract, by a failure to carry it out in accordance with its terms, or by attempting to perform it against the wishes and orders of the bailor. This principle is illustrated by but few reported cases. In an early English case the owners of vessels on a line between A and C, had given public notice that they would not be answerable for losses in any case, except the loss was occasioned by want of care in the master, nor even in such case beyond ten per cent. of the value of the goods shipped, unless extra freight was paid. The master took on board goods to be carried from A to B, an intermediate place between A and C, to be delivered at B. The vessel passed by B without delivering the goods there, and sunk before her arrival at C, without any want of care in the master. It was held that the owner of the vessel was responsible to the shipper of the goods for the whole loss.[32] In a later case a railroad company having carried goods from one of its stations to another, the station master at the place to which they were carried, without making inquiries of the consignor, after delay of a week,

certain number of days, or to deduct for each day's delay a certain amount from the freight money. These were held not alternative agreements, but that the amount to be deducted was in the nature of liquidated damages, and the carrier was bound to pay for a delay occasioned by an injury to a canal by a freshet. Harmony v. Bingham, 1 Duer, 209 (1854), affirmed 12 N. Y. 99 (1854).

[31] Place v. Union Express Co., 2 Hilt. 19 (1858).

[32] Ellis v. Turner, 8 T. R. 531 (1800).

delivered the goods to a person of a name very similar to that of the person named as the consignee. The contract of carriage was at a reduced tariff, conditioned to exclude all liability except for wilful misconduct. It was held that the delivery of the goods amounted to wilful misconduct.[33]

So in a case in our own courts a railroad company received cattle to be transported over its road under a special contract, in which it was stipulated that the owners of the cattle should undertake "all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise," and that the company should neither be bound "to forward the cattle by a particular train, nor be responsible for their delivery within any certain time." On the arrival of the train on which the cattle were being transported, at a station intermediate between the points of shipment and delivery, the cars containing the cattle were switched off on a side track by order of the freight superintendent of that section of the road, and detained three or four days. During this detention the cattle were neither fed nor watered, it being impracticable to supply them with food and water while on the cars, and there being no facilities for unloading them. In consequence of this and of exposure to the inclemency of the weather some of the cattle died, and the value of the others was greatly depreciated. The court ruled that the act of the freight superintendent in detaining the cattle was not negligence, but a deliberate and intentional breach of the contract, and that the company was liable in damages to the owner of the cattle.[34] In another case a clause in a bill of lading provided that "the goods are to be taken alongside by the consignee immediately after the vessel is ready to discharge, or otherwise they will be deposited at the expense of the consignee, and at the risk of fire, loss or injury in the warehouse provided for that purpose on the wharf." It was held that there was nothing in this condition which would

[33] Hoare v. Great Western R. Co., 37 L. T. Rep. (N. S.) 186 (1877).
[34] Keeney v. Grand Trunk &c. R. Co., 59 Barb. 104 (1870).

relieve the carrier from liability for loss occurring by the delivery of the goods to the wrong person by the clerk who had control of the warehouse, which belonged to the carrier.[35] The court distinguished this case from that of *The Santee*,[36] where the goods were to be delivered at the wharf, but the carrier was not in charge of the wharf, and the goods were taken away by an unauthorized person without the agency or interference of the carrier or his servants. Where one had contracted with a common carrier for the transportation of goods, and afterwards discovering that the carrier had been guilty of material misrepresentations, forbade him to undertake the carriage, which command, however, the carrier disregarded, and the goods were damaged while in the course of transportation, though without his neglect, it was held that the consignor had a right to terminate his contract as he did, and that the carrier in insisting on carrying the goods did so at his own peril upon risks and responsibilities incident to the employment, without regard to any limitation of liability contained in the contract originally.[37]

[35] Collins v. Burns, 36 N. Y. (S. C.) 518 (1873), 63 N. Y. 1 (1875). See also Guillaume v. Hamburg &c. Packet Co., 42 N. Y. 212 (1870); Gleadell v. Thomson, 56 N. Y. 194 (1874).

[36] 7 Blatchf. 186 (1870).

[37] Dauch v. Silliman, 2 Lans. 361 (1870).

CHAPTER VIII.

THE CONSTRUCTION OF CONTRACTS LIMITING LIABILITY.

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161. "C. O. D."
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163. "Damage."
164. "Dangers Incident to the Navigation of the River." See "Dangers of Navigation."
165. "Dangers of Navigation." And herein "Dangers Incident to the Navigation of the River," "Dangers of the Lake," "Dangers of the River," "Dangers of the Seas," "Inevitable Accidents," "Perils of the Lake," "Perils of the River," "Perils of the Seas" and "Unavoidable Accidents." See also "Unavoidable Accidents."
166. "Dangers of the Lake." See "Dangers of Navigation."
167. "Dangers of the River." See "Dangers of Navigation."
168. "Dangers of the Roads."
169. "Dangers of the Seas." See "Dangers of Navigation."
170. "Deficiency in Quantity."
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SECTION.

173. "Escapes."
174. "Extraordinary Marine Risk."
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176. "Fire."
177. "Forward."
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179. "From Whatever Cause."
180. "Good Order and Condition."
181. "Heat, Suffocation and the Other Ill Effects of Being Crowded."
182. "Inevitable Accidents." See "Dangers of Navigation," "Unavoidable Accidents."
183. "Inherent Deterioration."
184. "Leakage and Breakage."
185. "Load and Unload."
186 "Loss."
187. "Owner's Risk."
188. "On Lakes or Rivers."
189. "On the Train."
190. "Package." See "Article."
191. "Perils of the Lake." See "Dangers of Navigation."
192. "Perils of the River." See "Dangers of Navigation."
193. "Perils of the Seas." See "Dangers of Navigation."
194. "Perishable Property."
195. "Pilot, Master or Mariners."
196. "Place of Destination."
197. "Port of Discharge."
198. "Privilege of Reshipping."
199. "Quantity Guaranteed."
200. "Restraints of Princes."
201. "Robbers."
202. "Suffocation."
203. "Thieves." See "Robbers."
204. "Through Without Transfer."
205. "Tow and Assist Vessels."
206. "Unavoidable Accidents." See also "Dangers of Navigation."
207. "Value and Contents Unknown."
208. "Viciousness."
209. "Watered and Fed."
210. "Weather, Injuries Occasioned by."
211. Conflict of Laws.

§ 149. *The United States Statute as to Carriers by Water.*— Before proceeding to the general subject of this chapter, it may be proper to set out the statute of the United States relating to carriers by water and the decis-

ions thereunder. These provisions are given in Chapter six concerning the transportation of passengers and merchandise, contained in Title forty-eight of the Revised Statutes of the United States, relating to Commerce and Navigation, and are as follows: *Sec.* 4281. If any shipper of platina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks or timepieces of any description, trinkets, orders, notes or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them, contained in any parcel, or package or trunk, shall lade the same as freight or baggage on any vessel without at the time of such lading giving to the master, clerk, agent or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. *Sec.* 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. *Sec.* 4283. The liability of the owner of any vessel for any embezzlement, loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred without the privity

or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending. *Sec.* 4284. Whenever any such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares, merchandise or any property whatever on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and [*owner*] [owners] of the property and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. *Sec.* 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss or destruction of any property, goods or merchandise, if he shall transfer his interest in such vessel and freight for the benefits of such claimants to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease. *Sec.* 4286. The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel when so chartered shall be liable in the same manner as if navigated by the owner thereof. *Sec.* 4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers or seamen for or on account of any embezzlement, injury, loss or destruction of merchandise or property put on board any vessel, or on account of any negligence,

fraud or other malversation of such master, officers or seamen respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. *Sec.* 4288. Any person shipping oil of vitriol, unslaked lime, inflammable matches or gunpowder in a vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise to the master, mate, officer or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation. *Sec.* 4289. The provisions of [*this Title*] [the seven preceding sections] relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.[1]

§ 150. *Exceptions in the Contracts of Carriers Construed Strictly.*— In an old work already referred to,[2] the writer after regretting that the English courts had permitted the introduction of notices to limit the common law liabilities of carriers, adds: "But this dereliction of public duty has not been always successfully effected, the courts having af-

[1] Rev. Stat. U. S. 1878. This statute does not apply to carriers by land (New York Central &c. R. Co. v. Fraloff, 9 Cent. L. J. 432 (1879); nor to a passenger by water who carries in his trunk his ordinary wearing apparel, ornaments and professional implements, however rare or valuable they may be. Brock v. Gale, 14 Fla. 523 (1874). The exception as to "inland navigation" does not include vessels used on the great lakes. See also as to the construction of this statute, The City of Hartford v. The Unit, 11 Blatchf. 290 (1873); The City of Norwich, 1 Ben. 89 (1866); The Niagara v. Cordes, 21 How. 7 (1858); Thorp v. Hammond, 12 Wall. 408 (1870); Norwich Co. v. Wright, 13 Wall. 104 (1871); Walker v. Transportation Co., 3 Wall. 150 (1865); Keene v. The Whistler, 2 Sawy. 348 (1873); Allen v. Mackay, 1 Sprague, 219 (1854); Moore v. American Trans. Co., 24 How. 1 (1860).

[2] *Ante*, Cap. IV, § 87.

forded every relief in their power by construing such notices most strictly in the language and requiring as equally strict a proof of the publicity to be given them."[3] In America the same policy has been followed by the courts, and it has become a cardinal rule in the interpretation of the contracts of common carriers that while they may be allowed to provide by contract for exemption from their common law liability, yet that this must be done in clear and unambiguous language. Exceptions inserted in their receipts and contracts are construed strictly against them.[4] Examples of this rule are given in the notes to the present section and in other portions of this work.[5] General words of exemption, when used after a specification of particular exemptions and risks, will be presumed to include only those of a similar character unless a different intent appear.[6] A receipt given by a common carrier must be taken altogether; one part can not be separated from the other in interpreting it.[7]

§ 151. *The Maxim Expressio Unius est Exclusio Alterius.*

[3] Jeremy on Carriers, Ch. 4, § 2 (1815).

[4] Magnin v. Dinsmore, 56 N. Y. 168 (1874); Steele v. Townsend, 37 Ala. 247 (1861); Ayres v. Western R. Co., 14 Blatch. 9 (1876); Union Mut. Ins. Co. v. Indianapolis &c. R. Co., 1 Disney, 480 (1857); St. Louis &c. R. Co. v. Smuck, 49 Ind. 302 (1874); Barter v. Wheeler, 49 N. H. 9 (1869); Southern Express Co v. Moon, 39 Miss. 832 (1863). While it is competent for common carriers to provide by contract for exemption from their common law liability, it must be done in clear and unambiguous language, and the rule that the language of contracts if ambiguous is to be construed against the party using it, should be rigidly applied to such contracts. Edsall v. Camden &c. R. Co., 50 N. Y. 661 (1872). "As the exception is an innovation on the principles of law, and introduced exclusively for the benefit of the carrier, the construction must be most strongly against him." Levering v. Union Trans. &c. Co., 42 Mo. 88 (1867). "Restrictions on the common law liabilities of common carriers in a receipt given for goods delivered to them for transportation, drawn up and executed for them alone and for their benefit, must be taken most strongly against the carriers." Hooper v. Wells, 27 Cal. 11 (1864).

[5] See Cap. VI.

[6] Hawkins v. Great Western R. Co., 17 Mich. 57 (1868).

[7] Butler v. The Arrow, 6 McLean, 470 (1855). A common carrier may

— Mr. Justice STORY, referring to an early English case, has raised the question without answering it, whether if a

stipulate for exemption from liability for losses occurring through his negligence; but his contract will not be construed to contain such an exemption, unless it be so expressly agreed. Therefore, where the contract did not contain such express stipulation, but did contain a stipulation limiting the carrier's liability in any event to $50, and there was proof of the non-delivery of the goods to the consignee, and that some months after shipment the box which had contained them was picked up empty, no explanation of the non-delivery being shown: *Held*, that these facts warranted the submission of the question of negligence to the jury, who, in their verdict, should not regard the stipulation limiting the carrier's liability to $50. "The terms of these contracts are very much under the control of the carriers, and they may justly be required to express in plain terms the entire exemption for which they stipulate. The language of this clause is very broad; but if it be desired that a clause shall cover losses by negligence, it is not too much to say that the purpose must be clearly expressed." Magnin v. Dinsmore, 56 N. Y. 168 (1874). A bill of lading contained this provision: "All loss and damage * * from any act, neglect or default whatsoever of the pilot, master or mariners being excepted, and the owners being in no way liable for any consequences above excepted." The goods were delivered by the mate of the vessel on which they were shipped to a stranger who neither had nor presented any authority to receive them. It was held that the provisions in the bill of lading did not cover this careless act of the defendants' servant. Guillaume v. Hamburg &c. Packet Co., 42 N. Y. 212 (1870). It was provided in the bill of lading that the goods should be taken from alongside by the consignees, "immediately the vessel is ready to discharge, or otherwise the privilege is reserved to the vessel to land them on the pier, * * * at the expense of the consignee and at his risk of fire, loss or injury:" *Held*, that after such landing the goods remained in plaintiff's custody as carriers, subject to the modified responsibility created by the contract, until after notice of arrival had been given the consignee and a reasonable time had elapsed for their removal, and that the clause did not exempt the plaintiff from liability resulting from his own negligence. Gleadell v. Thomson, 56 N. Y. 194 (1874). The agent of a tow-boat agreed to tow a canal boat "at the risk" of the master and owner of it, the master agreeing to have a competent man at the helm and to guarantee the seaworthiness of his boat for the trip: *Held*, that the contract did not exempt the owner of the tow-boat from liability for the negligence of his agent, whereby the canal boat was injured. Ashmore v. Pennsylvania Steam Towing Co., 28 N. J. (Law) 180 (1860). A contract of hiring contained this stipulation: "And all risks incurred or liability to accidents whilst in said service is compensated for and covered by the pay agreed upon; the said railroad company assuming no responsibility for damages from

carrier's contract contain certain exceptions to his liability, but omit those which the common law allows for his benefit — the act of God and the public enemy — the express exceptions do not exclude the implied ones,[8] in accordance with the maxim *expressio unius est exclusio alterius*.[9]

accident or any cause whatever." It was ruled that this did not relieve the company from an injury resulting from the negligence of the company's servants. Memphis &c. R. Co. v. Jones, 2 Head. 517 (1859). A railroad ticket contained this provision: "It is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company." This even if the company could contract against negligence would not be effectual. Indiana &c. R. Co. v. Mundy, 21 Ind. 48 (1863). In New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. 344 (1848), the contract contained the following: "Take notice—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it and its contents, at any time." Mr. Justice Nelson in construing the contract said: "The language is general and broad and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties."

[8] Bever v. Tomlinson (1796), thus stated in Abbott on Shipping (6th Am. ed.) p. 4. cap. 6, p. 386: "In a case which came before the Court of King's Bench a short time before the late alteration of the bill of lading and which was an action brought to recover the value of goods for which the master had signed a bill of lading containing an exception only of the perils of the sea, although made during the time of a war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the court whether a loss so occasioned were within the meaning of this exception, and the cause never proceeded to a final judgment. The express exception in this case afforded room to contend that the exception of the act of the King's enemies, which arises out of general rules of law, was meant to be excluded in the particular instance."

[9] Story on Bailments, § 550.

This has never been settled in England for the reason that the modern bills of lading contain all the exceptions. It was said in an early case in South Carolina that if a common carrier specially undertake to deliver safely any article carried, he will be bound by his undertaking to answer for the loss, although it may happen from a cause which in the absence of an express contract would excuse him;[10] and in *Fish v. Chapman*,[11] where a wagoner contracted to deliver certain packages in good order and condition, "unavoidable accidents only excepted," it was held that this exception excluded all others and that therefore he would be liable for a loss by the public enemy.

The case of *Scaife v. Farrant*,[12] decided in the English Courts of Exchequer and Exchequer Chamber,[13] in 1875,

[10] Gaither v. Barnet, 2 Brev. 488 (1811). The reporter speaks of the loss in this case as an "unavoidable accident," but it is clear from the opinion that this phrase is used by him as synonymous with the "act of God."

[11] 2 Ga. 349 (1847).

[12] 23 W. R. 469, 2 Cent. L. J. 383 (1875). The facts stated fully were as follows: The plaintiff being desirous of moving his furniture from Paignton to Plymouth, applied to the defendant for that purpose. The furniture was seen by the defendant's foreman, and the defendant on the 19th of August, 1873, wrote to the plaintiff in the following terms: "I beg to inform you that the terms for the removal of your furniture and effects, as seen by my foreman, from Paignton to Plymouth, will be £22 10s., with risk of breakages in transit, including the use of all necessary mats, cases and packing materials and every expense. In the event of your accepting this estimate, be kind enough to sign and return to me the annexed memorandum by which I am liable to the amount therein specified." The memorandum was signed by the plaintiff, and was in the following terms: "I hereby agree to pay you the sum of £22 10s. for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakages (if any) not exceeding £5 on any one article." The defendant had an office in Torquay and exhibited a board containing the words: "W. Farrant, Torquay. S. D., Railway Company' Agent. Matting, Cases, &c., on sale or hire. Horses, Vans, &c., on hire. Extensive stores for warehousing furniture &c., by the week, month and year. Goods and parcels collected and delivered." Similar words appeared on advertising boards at the railroad station and also on the defendant's cards. The goods were destroyed by fire during transit by rail.

[13] Scaife v. Farrant, 23 W. R. 840, 2 Cent. L. J. 605 (1875). The argu-

called for the application of this maxim. The defendant was the agent of a railroad company for carrying goods and removing furniture, and he also sent goods and furniture

ments and judgments on appeal are herewith appended.

In the Court of Exchequer Chamber.

June 25.—Lopes, Q. C. (Charles, with him), for the plaintiff. The defendant is a common carrier, and even if he is not a common carrier, he has, on the facts of this case, the liability of a common carrier, and must be held to have been the absolute insurer of these goods. On both these points the case of Liver Alkali Company, 20 W. R. 633, L. R. 7 Ex. 267 (1872), and L. R. 9 Ex. 338 (Ex. Ch.) (1874), is decisive. In that case in the court below it was held that the defendant was a common carrier, and in this court that he had at all events the liability of a common carrier. [Brett, J.: I tried to express in my judgment in that case my opinion that the defendant was not liable as a common carrier, but that he was liable by reason of a custom.] The judgment of the majority of the court seems to be that he was liable as a common carrier. The definition of a common carrier is found in Coggs v. Bernard, 1 Sm. L. C. 284 (1703), and the defendant comes within the definition in Gisbourn v. Hurst, 1 Salk. 249 (1710). [Lush, J.: The judgment of Mr. Justice Blackburn in Liver Alkali Company v. Johnson, does not clearly mark the difference between a common carrier and one who takes on himself by usage or contract the liability of a common carrier. These are two distinct cases.] The plaintiff relies upon both points. [Cockburn, C. J.: Assuming that the defendant is a common carrier, he would be liable for breakage; but here there is a special clause rendering him liable. Why was that inserted?] That is not an agreement to exempt defendant from the liability of a carrier; it is merely a clause fixing the measure of damages on each article in the event of a certain kind of accident; it does not discharge the defendant. Clarke v. Gray, 6 East, 564 (1805). The defendant can not, by making a special stipulation as to certain details of his duty as a common carrier, alter his character as such carrier or relieve himself from his general responsibility.

Cole, Q. C. (Pinder, with him), for the defendant: The judgment of the court below is right; the defendant is not a common carrier, and if he is, still in the present case he has limited his liability by a special contract. He inspects goods in each case and makes a contract with each customer. The terms of his advertisement exclude the contention that he is a common carrier, and the letters that passed between the plaintiff and defendant clearly show that a special contract was made in this case. The judgment of Mr. Justice Creswell in White v. Great Western R. Co., 5 W. R. 488, 2 C. B. (N. S.) 7 (1857), is in point. The learned judge says, p. 19: "It appeared that the defendants did not receive goods to be carried, unless the consignor signed a paper containing various conditions. The judge who presided at the trial thought that contract was special, and that the defendants did not receive the goods

in his own vans to all parts of England. He published a card in which he set forth his business, the card concluding as follows: "Contracts entered into for removing furniture

as common carriers. The court is of opinion that he was right." That case applies here. Brind v. Dale, 8 C. & P. 207 (1837), is authority for the defendant. He, as the defendant there, merely lets out carts for hire, and here as there, the contract is only to carry the goods safely as far as regards the neglect of himself and his servants, and not to insure their safety at all events. *Cur. adv. vult.*

The following judgments were subsequently delivered:

Mellor, J.: I am of opinion that this judgment must be affirmed. The facts appear to me clearly to show that the delivery of the furniture in question to the defendant was not a delivery to him as a common carrier or as undertaking the liabilities which attach to a common carrier, but was a delivery under a special contract, to be collected from the letters of the defendant to the plaintiff, and the memorandum signed by the plaintiff. I think that the meaning of the letters and memorandum is, that the defendant was willing to remove the furniture from Paignton to Plymouth for the sum of £22 10s., he undertaking the particular risk of breakage, not exceeding £5 on any one article. Of course this does not exclude liability for negligence or want of reasonable care on the part of the defendants and his servants. I think that the circumstances of the case show that the defendant undertook no other risk of casualty than that, and the argument for the plaintiff has failed to show that any further or more extensive liability attached to the defendant. The contention on behalf of the plaintiff rested mainly upon the judgment in Liver Alkali Company v. Johnson, in the Exchequer Chamber. L. R. 9 Ex. 338 (1874). Had that case not been clearly distinguishable in its facts from the present, it would have been binding upon us sitting as a co-ordinate court of appeal, and it can only be qualified or reversed by a decision of the House of Lords. For myself I decline on the present occasion to discuss the grounds upon which that case proceeded, because I think it is entirely unnecessary to do so, and I therefore confine my decision to the meaning of the special contract between the parties, to which I have already referred. I may add that my brother Grove agrees in this judgment.

Lush, J.: It does not appear to be necessary to decide the question which was first argued on this appeal, namely, whether the defendant comes within the definition of, or whether in the ordinary course of his business he incurs the liability of a common carrier, so as to be answerable for damage to the goods not caused by any act or default of himself or his servants. I agree with the court below that the letters and memorandum contained in this case constitute a special contract, and I think that whether without those letters the defendant would have been liable or not for the accident which happened to the goods, the terms of the contract sufficiently show that both parties understood that the risk un-

to or from any part of the Kingdom. Estimates given free." The plaintiff sent certain furniture by the defendant on the railroad, under an agreement which set forth

dertaken by the defendant was of a much more limited nature. The letters written by the defendant, the proposal signed by him inclosing the answer to be returned, and which was accordingly returned signed by the plaintiff, form the contract in this case. The proposal is, "I beg to inform you the terms for removal of your furniture will be £22 10s., with the risk of breakages in transit. In the event of your accepting this estimate, be kind enough to return to me the annexed memorandum by which I am liable to the amount specified." The answer is in these terms: "I hereby agree to pay you the sum of £22 10s. * * * you undertaking risk of breakage (if any) not exceeding £5 on any one article." It was contended by the plaintiff's counsel that these documents should be read as merely limiting the amount which should be payable by the defendant in the event of damage by breakage, leaving him by implication liable to the full extent for all other casualties. It is impossible, I think, to put such a construction on the letters, or to suppose that either party so understood them. The fair meaning of them is that the defendant was willing to undertake a particular and no other casualty, and to pay up to £5 for any article damaged by that casualty, and this the plaintiff must have understood to be the meaning, and by that contract both parties are bound. I agree that this contract does not exclude liability for such damage as might result from want of due and reasonable care in the packing or the carriage of the goods, but the damage which happened was not caused by any such default, but was as far as the defendant was concerned purely accidental. I therefore think that the judgment should be affirmed, and in this judgment my brother Lindley agrees.

Denman, J.: I am of opinion that the judgment of the Court of Exchequer ought to be affirmed. It was contended for the defendant, first, that the general course of his dealing did not make him a common carrier, or one who was subject to the liability of a common carrier *qua* furniture undertaken to be carried; and secondly, that even if he might, in the absence of any special contract, have been liable as a common carrier, there was in this case such a special contract for the carriage of the furniture of the plaintiff as to exempt him from the liability which, in the absence of a special contract, might possibly have been implied. Upon the first point the plaintiff relied mainly on the case of Liver Alkali Company v. Johnson, L. R. 9 Ex. 338 (1874). If that case were identical in its material facts with the present, I should hold myself bound by it so far as to say that, whether a common carrier or not, to all intents and purposes the defendant must be held liable as having undertaken a business imposing upon him the same liabilities as those of a common carrier. But I am of opinion that the mode of dealing adopted by the defendant in this case, differs in many most important particulars

that he had engaged the defendant for the removal of his furniture, "you [the defendant] undertaking risk of breakages (if any) not exceeding £5 on any one article." While

from that of the defendant in Liver Alkali Company v. Johnson. In this case, though it is found "that the defendant has for several years carried on upon his own account the business or employment of a carrier, removing and carrying goods and furniture for hire, for all persons indifferently who applied to him," the case adds that he conducts that business upon terms which appear on the card annexed to the case. Upon a perusal of this card it appears to me that it contains terms which, added to the other facts in the case, in relation to the defendant's ordinary mode of doing business, negative any inference in favor of his being a common carrier which might otherwise have arisen from the above-mentioned finding, and also negative any inference that he dealt upon such terms as to incur the liabilities of a common carrier. The card is headed "S. D. Railway Goods and Parcel Office." It describes the defendant as sole agent, which I interpret to mean of the S. D. Railway Company. It speaks of "furniture stored, of vans, carts and horses on hire," neither of which can be said to refer to the proper business of a common carrier. It then contains these words: "Large lock-up vans for removing furniture, glass, china, &c., by road or rail, without packing," which is quite as consistent with the business of letting out such vans on hire as with an undertaking to use such vans as a carrier in removing the goods of others. Then at the foot of the card are the words: "Contracts entered into for removing furniture to or from any part of the kingdom. Estimates given free." On the back of the card is engraved a specimen of one of the vans on a railway truck. The case finds that the course of business is for an inspection of the furniture to take place before any contract is made, and for the price to be fixed after such inspection. Reading the whole of the card together with the facts found, I come to the conclusion that the defendant did not so deal with the public as to undertake to carry goods in the absence of an agreement as to the terms of carriage. The card itself must, I think, be taken as a part of the defendant's mode of dealing, and the substance of it appears to me to be, not that he will carry at all events, but only that he will carry if his estimates and terms are agreed to. In discussing these terms many things would have to be taken into account, as, for example, whether the goods are to go by road or rail, whether the van was to be under the control of the plaintiff or the defendant's driver, whether any other person's goods are to be allowed to travel by the same van or not, for the case does not find that the van is always used for the goods of one person, and many other matters, such as route, speed, whether in van or cart, &c., the decision as to which might alter the estimate. In Liver Alkali Company v. Johnson, the Lord Chief Baron says: "No doubt, if each particular voyage had been made under a special contract containing only the stipulations applicable to that voyage the case would have been

the furniture was in transit it was burned, without any negligence on the part of the defendant. The jury found for the plaintiff, the judge reserving leave to the defendant to move to enter a nonsuit. A rule *nisi* having been accordingly obtained, it was made absolute and a nonsuit entered by the Court of Exchequer, it being there held that the special contract limited the liability of the defendant to loss by breakage or by his negligence, and excluded any ques-

different." In the present case I think that the very mode of dealing pointed out in the card, and stated in the case, necessarily involves a special contract in each case applicable to each journey only, and that the case of Liver Alkali Company v. Johnson is very distinguishable on that ground. I think the card itself was fair notice to the world that a special contract must be made before any liability to carry would be incurred, and that it follows that any one having such notice would be bound to stipulate expressly for any such liability as that of a common carrier, before he could charge the defendant as upon any such liability. Upon the second point, viz.: whether, supposing the defendant to be generally carrying on the business of a common carrier, or carrying on a business so as to be generally liable as a common carrier, he was so liable in this case, or whether he had not limited his liability by reason of his letters to the plaintiff—I entirely agree in the view taken by my brother Bramwell in the court below. The words "you undertaking risk of breakage," though to an amount immediately afterwards limited, seem to me conclusive to show that the relation of common carrier to the owner of goods was not contemplated by the plaintiff in the particular case, whatever might have been the relation between the plaintiff and defendant in the absence of such a stipulation. On both grounds I am of opinion that our judgment should be for the respondent.

Cockburn, C. J.: I entirely agree in the view taken by the rest of the court that this was a special contract, and that therefore the liability of the defendant, as a common carrier could not arise. I wish it to be clearly understood that I concur with the rest of the court; but if it had not been so I should have thought myself bound to enter into the question whether the defendant was a common carrier at all, and I wish to say that I have, after examining all the authorities, formed a strong opinion that that is a question that ought to be submitted to further consideration. It is not necessary to decide that in the present case, and I agree with the view taken by the whole of the court that this is a special contract.

Brett, J.: I desire to say that I agree with the rest of the court, but I also agree with the view of the Lord Chief Justice that there was no evidence in this case that the person was a common carrier.

Judgment affirmed.

tion of liability as a common carrier. BRAMWELL, B., said: "I am of opinion that this rule must be made absolute. If nothing more had happened than that the goods were sent for, I think the defendant would have made himself liable as a common carrier. But that was not the case, as there was a special agreement between the parties. We must look at the nature of the business carried on by the defendant. He describes himself on his card as 'entering into contracts for removing furniture to or from any part of the Kingdom.' His general mode of carrying on business was by contract, and in this instance he made a contract, for which we must look to the two letters written. In these letters he limits his liability in respect of breakage. If he were a common carrier, I do not think these words would limit his liability. But the case does not stand on the common law of carrier and customer. This man says; 'I will take goods not in a fit condition to travel and will put them in a condition to travel,' which is not the ordinary case of carrier and customer. Then he says in his letter that his terms are '£22 10s., with risk of breakage in transit.' This means "I will take on me risk of breakage in transit.' If he were a common carrier he would undertake not only this risk but all risks. But he says 'I undertake for one particular risk.' Why do not the general rules apply—"*expressio unius est exclusio alterius*," and *expressum facit cessare tacitum*?" That is to say, the defendant stipulates not to be liable for anything else. No doubt he would be liable for failure in the use of ordinary skill, because ordinary care is not excluded. The letter proceeds to say, 'for the amount therein specified.' These words do not alter the case as to quality, but as to amount. The memorandum signed by the plaintiff says, 'I hereby agree to pay £22 10s., you undertaking the risk of breakages (if any) not exceeding £5 on any one article,' the effect of which is that he is liable for breakage and nothing else, and only for that to the extent of £5. I think that justice is done by this view of the case. Very likely neither party had any

notion of liability as a common carrier. The defendant has an agreement stating what the terms of the carriage are, and it is for the plaintiff to show that he is liable under that agreement, not that the common law puts a liability on him." POLLOCK, B.: "I also think that the rule should be made absolute. The question is of the proper construction to be given to a written contract. If the defendant is a common carrier he is not the less liable because he carries under a special contract.[14] But before we consider the position of the defendant we must look at the special contract. This is not the case of a person admitted to be a common carrier and his liability limited by a special contract. The defendant transports furniture, china, glass, etc., and does much beyond the duties of a common carrier, such as packing, etc. I do not propose to enter into the terms of the contract. What may fairly have been intended by the parties was that the defendant was to be liable for breakage only, and that to a limited extent. I think our judgment should be for the defendant." The case being subsequently carried to the Court of Exchequer Chamber, the judgment of the lower court was, after lengthy and elaborate arguments on both sides, unanimously affirmed.

§ 152. *Opinion of Bigelow, C. J., on the Application of the Maxim.*— In *Gage v. Tirrell*,[15] decided by the Supreme Judicial Court of Massachusetts in 1864, it was held that the owner of a ship employed in the transportation of merchandise for persons generally, who had agreed to transport certain goods without making any special stipulation as to his liability, did not enlarge his liability by signing without any new consideration a bill of lading in which he stipulated that the goods should be delivered, the "dangers of the seas only excepted," so as to be liable for a loss arising from the act of a public enemy. Because the question here in dispute has been raised in but three cases in this country, the decisions in which are conflicting, and because it is

[14] Liver Alkali Company v. Johnson, L. R. 9 Ex. 338 (1874).
[15] 9 Allen, 299.

one of great importance in the construction of contracts limiting the liabilities of common carriers, it may be in place to quote at some length from the opinion of the chief justice in the last case: "We are to determine in the first place," said BIGELOW, C. J., "whether the defendants are shut out from availing themselves of the exception to the liabilities of common carriers imposed by law for loss of goods intrusted to them caused by public enemies. If they are to be excluded from the benefit of this exception, it must be, as has been already said, on the ground that in the bill of lading they have inserted a special exception, exempting themselves from liability for losses happening by dangers of the sea, and can not now excuse themselves for the non-performance of their contract by the happening of events which are not embraced within the terms of this exemption. In other words, the argument is that an express exception excludes all implied exceptions. The maxim *expressio unius est exclusio alterius* is a cardinal rule of exposition, of familiar application, founded in good sense and sound reason, and affording an appropriate method of arriving at the presumed intent of parties to deeds and instruments in which it is not fully expressed. But, as has been justly observed by a learned writer, great caution is requisite in applying the rule, lest it may be used for the purpose of defeating instead of subserving the real intent of parties.[16] There can be no doubt that where a party expressly covenants that he will do a certain act, he can not qualify or restrict the covenant so as to excuse its non-performance by exceptions or limitations arising from implication only. In such cases the inference is reasonable that if the parties did not mean that the covenant should be absolute they would have expressed the limitation which they intended to put upon it. Thus, where there is a covenant to repair in a lease, no implied contract to make repairs can be raised; nor can the performance of such a covenant be excused by the happening of events for which no provision

[16] Broom's Legal Maxims, 506.

was inserted. But the exclusion of all implications must be confined to the same class or kind of acts or stipulations as that to which the express agreement or covenant relates. It can not be extended so as to embrace matters concerning which the parties have made no stipulations. In other words, it can not be said that a party is deprived of the benefit of all implied covenants in relation to the subject-matter of a contract, because he has entered into express stipulations concerning certain specific incidents or particulars connected with or growing out of the contract. For example, an express covenant in a lease by a tenant to repair would in no way affect the implied covenant not to commit strip or waste on the premises. So an agreement in a charter party that the shipper should bear a loss which might arise from an inherent vice of the article shipped, would not exempt the carrier from liability for an injury resulting from the negligence of the master or sailors. The reason is that in such cases the agreement expressed is not connected with and bears no necessary or direct relation to that which is implied, and hence no just inference can be drawn that the parties intended by inserting one stipulation to exclude all other implied obligations on distinct and independent matters. The only safe mode of applying the rule is to ascertain whether it can fairly be presumed from that which is expressly stipulated that the matter sought to be excluded was present to the minds of the parties when the agreement was entered into. The exclusion can reasonably extend no further than to shut out all implied agreements and stipulations of the same nature or relating to similar matters. Thus, if a party take an express warranty of an article from a vendor, it is reasonable to suppose that the subject matter of warranty was in his mind at the time of the sale, and that he caused to be inserted in the contract a promise concerning the nature and quality of the articles sufficiently comprehensive to include all on that subject which the parties intended should form part of the bargain. But if the contract contained no warranty at all, but con-

sisted of stipulations on other matters, the warranty implied by law, if any, would still form part of the contract, and an action for a breach of it could be maintained. Indeed it may be said generally that the maxim *expressum facit cessare tacitum* is never to be applied in the construction of contracts peremptorily and absolutely, so as to exclude from the contract everything not embraced in the stipulations of the parties. Its legitimate and proper use is to shut out implied agreements on the same or similar subjects as those concerning which the contract speaks; even such exclusion should be extended only so far as to subserve the plain intent of the parties. If these views are correct, the interpretation of the contract in the present case is free from all difficulty. Giving full effect to the clause in the bill of lading exempting the defendants from liabilty for losses occasioned by perils of the sea, it does not follow that they thereby assumed all losses which might arise from the capture of the ship and seizure of the cargo by public enemies. The two causes of loss are entirely distinct and diverse, and have no necessary connection with or relation to each other. They belong to entirely different kinds or classes of risks. No inference can be reasonably drawn from the exemption of the carrier by a special agreement from one class or kind, that it was the intention of the parties that he should assume the other for which the law would not hold him liable, if there had been no exception inserted in the contract; or in other words that a stipulation exempting the carrier from liability for the consequences of perils of the sea carries with it by implication an agreement to assume the distinct and independent risk of a seizure or capture. Such an inference seems to us not only to be unreasonable and illogical, but to be in direct violation of the plain intention of the parties. The object of the exception was not to enlarge the carrier's liability. On the contrary the purpose was to put an additional restriction on the risks which they were contented to bear. The special exception was not confined to acts of God. If

it had been, the argument would have had great force that the insertion of an exception, which the law would imply in the absence of any stipulation, indicated the intention on the part of the carriers to exclude this class of risks and to assume all others. It would be difficult to assign any reason for making a special exception of risks which the law did not impose. But the exemption for which the defendants stipulated included other risks than those comprehended within the class denominated as the acts of God. Perils of the seas embrace not only inevitable accidents arising from tempests, floods, earthquakes and other dangers happening without the intervention of man, but also those caused by collisions, fires, pirates and other occurrences, to the happening of which human agency directly contributes. It was to escape liability for losses occasioned by risks of the latter character that the special exception was inserted in the bill of lading. It was designed to confine the risk for which the defendants were to be liable within narrower limits than those affixed to the contract of affreightment by the general rules of law. It would be a gross perversion of the plain intent of the parties to hold that by such a restriction the liability of the carriers was increased, and the burden of additional risks thereby assumed by them for which in the absence of any stipulation they would be exempted by legal implication. It follows from this view of the contract of affreightment into which the parties entered, that the doctrine, well established and familiar, that a party who takes on himself a duty or charge is bound to fulfil or perform it, and cannot allege any accident or necessity, however inevitable or overwhelming, as an excuse for a failure to keep his stipulations, can not be applied in the present case, as is urged by the counsel for the plaintiffs, so as to enlarge the liability of the defendants as carriers at common law. If we are right in the exposition we have given to the stipulations of the parties, there was no agreement, either express or implied, that the defendants should undertake any of the risks from which

common carriers are usually exempted, but on the contrary the effect of the clause in the bill of lading excepting perils of the sea from the risks assumed by the defendants was to extend this legal exemption, and to relieve the defendants from certain risks for which they would have been liable but for this special stipulation in the contract of shipment. The cases cited by the plaintiffs' counsel do not support his argument. None of them are adjudications on the liability of common carriers. They all relate to special charter parties or contracts of affreightment for the carriage of goods in vessels in which the ship owner let his ship for a voyage or agreed to carry a specific cargo, and did not hold himself out to carry merchandise for persons generally. In such cases the shipowner can not be regarded as a common carrier. He is not subject to the risks or entitled to the exemptions which the law attaches to persons acting in that capacity. His liability must depend entirely on the special agreement for the transportation of merchandise into which he has entered. If he has agreed absolutely to carry it to a particular place, he can not set up as a sufficient reason for the non-performance of his contract any special ground of exemption for which he did not stipulate. The precise question which we have been considering seems not to have been settled in the English courts. It was raised but not determined in the case of *Bever v. Tomlinson*.[17] It is not likely to arise again there, because the form of bills of lading now usually adopted in England contains an express exception, exempting shipowners from liability for losses caused by the act of God and the public enemy, as well as from many other risks commonly embraced within the general description of perils of the seas. Nor has the question heretofore come up for express adjudication in the courts in this country. In *Williams v. Grant*[18] it was said that common carriers are not liable for losses by the act of God whether the bill of lading contains any exception of them

[17] *Ante*, § 151.

[18] 1 Conn. 487 (1816).

or not; and the same doctrine was re-asserted in *Crosby v. Fitch*.[19] These *dicta* seeem to accord with the views which we have taken of the proper effect to be given to a special exception of particular risks in the bill of lading. Certainly no authority has been cited and none we believe can be found to sustain the proposition urged in behalf of the plaintiffs, that an exception of perils of the seas of itself operates to render a common carrier liable for other risks of a different character from which he would otherwise be exempted by the general rule of law, or in other words that it is equivalent to a distinct stipulation by the carrier to assume the risk of loss caused by a public enemy. In the absence of any binding authority we can not give our sanction to a conclusion which is not warranted by any just rule of exposition, and which seems to be contrary to the plain intention of the parties to the contract. The result is that the defendants are not liable for a loss of the property intrusted to them, caused either by public enemies or perils of the sea. From the former they are exempted by the rule of the common law; from the latter by force of the special exception inserted in the bill of lading."

§ 153. *Terms in Insurance Policies and Bills of Lading Construed Differently.*— Many of the words and phrases, whose legal meanings are given in the succeeding sections of this chapter, are also to be found in policies of marine insurance. But it is to be observed that words of exemption contained in bills of lading are more strictly construed than similar terms in the law of insurance. The rules which regulate losses under policies of insurance differ wholly from those which govern in the case of common carriers. Each contract has its own peculiarities and principles of interpretation, and the interpretation given in one case is not applicable and can not be followed in the other.[20] A striking example of this distinction is seen in the law of

[19] 12 Conn. 410 (1838).

[20] McArthur v. Sears, 21 Wend. 199 (1839); King v. Shepherd, 3 Story, 349 (1844).

insurance, where when a loss has arisen from a cause insured against, the underwriter is responsible, although the master did not use due care to avoid it; the contrary being the rule in the contracts of common carriers.[21] "A policy of insurance," says WILLES, J.,[22] "is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant." In *The Freedom*,[23] it was said by one of the judges, Sir JOSEPH NAPIER: "The words in the bills of lading 'dangers of the seas' must of course be taken in the sense in which they are used in a policy of insurance. It is the settled rule of the law of insurance not to go into distinct causes but to look exclusively to the immediate and proximate cause of the loss. In the present case the remote causes are not only distinct from the proximate cause, but they are for the most part unconnected with dangers of the seas." In *The Chasca*,[24] Sir ROBERT PHILLIMORE, a distinguished admiralty judge, refers to the error contained in this extract in this language: "The only question in this case is whether damage resulting from the barratrous act of the crew in boring holes in the ship's sides falls un-

[21] General Mut. Ins. Co. v. Sherwood, 14 How. 351 (1852); Hazard v. New England Mut. Ins. Co., 8 Pet. 557 (1834).

[22] Grill v. Iron Screw Co., L. R. 1 C. P. 600 (1866).

[23] L. R. 3 P. C. 594, 24 L. T. (N. S.) 452 (1871).

[24] L. R. 4 Adm. 446, 23 L. T. (N. S.) 838, 44 L. J. Adm. 17 (1875).

der the exception of 'dangers of the seas' in the bills of lading. The learned judge of the county court has come to the conclusion that it does, founding his opinion upon a presumed analogy between cases of policies of insurance and cases depending upon contracts contained in bills of lading. This analogy is in my judgment fallacious. In questions arising on exceptions introduced into contracts of affreightment, the court is bound to look to the real, and not merely as in cases of marine insurance, to the proximate cause of the loss. The only authority cited to the contrary has been a *dictum* in *The Freedom*. * * * This *dictum* was in no way necessary to the decision of the case before their lordships, and it appears to me that it was an erroneous *dictum* that must have found its way through inadvertence into their lordships' judgment."

§ 154. *Interpretation of Words and Phrases in Contracts.* — In the remaining sections but one of this chapter the interpretation of particular words and phrases to be found in the contracts of carriers limiting their common law liabilities is considered. These are given alphabetically and with cross references so as to be easily referred to, and are arranged much in the form of a digest. Considering that questions of construction of the terms of contracts are constantly before the courts, and that no previous treatise on Carriers has devoted any space to the subjects of the following sections, it is thought that this chapter may not be without real value.

§ 155. "*Accidental Delays.*" — A railroad company was a common carrier of passengers and freight, which were transported part of the way on a line of steamboats. The boat which usually made the connection with the road having been taken off for necessary repairs, a small one was used, which not being able to carry all the freight brought, part of it was left in the depot and there accidentally burned before it could be forwarded. This was held to be an "accidental delay" within a clause in a bill of lading that the carriers should not be liable "for any injury to

freight arising from the weather or accidental delays." [25]

§ 156. "*Agrees.*"— "There being made some question whether the indorsement on the ticket 'the person accepting this free ticket assumes all risks, etc., and expressly agrees, etc.,' is a contract on the part of the passenger with the company, it seems necessary to say that the word 'agreed' means the concurrence of two parties." [26] The words in a receipt "it is mutually agreed" have no effect in binding a shipper to terms contained in it of which he is ignorant.[27]

§ 157. "*All Rail.*"— An agreement to carry "all rail" must be strictly followed, or the deviation will forfeit the exception in the contract, as if the goods are carried by sea [28] or by any other mode, even for a few miles.[29] But a necessary crossing of ferries is permissible under these words.[30]

§ 158. "*Article.*"— In accordance with the rule heretofore stated that a notice given by a carrier to limit his responsibility for goods lost must be strictly construed against him, such a notice, specifying that he will not be liable for a greater amount than $100 on any "article," contained in a printed receipt given for a trunk, is not construed as restricting the liability for the entire contents of the trunk to $100, but as limiting his liability for each one of the articles contained in it.[31] A trunk, however, is generally used to carry a collection of different articles, and the reason for this ruling could hardly apply to the case of a box or package. Thus in *Wetzell v. Dinsmore*,[32] the decision was different. There the defendant company re-

[25] Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869). See as to the effect of delays *ante*, Cap. VII, § 145, *et seq.*

[26] Gould, J., in Wells v. New York Cent. R. Co., 42 N. Y. 181 (1862).

[27] Mosher v. Southern Express Co., 38 Ga. 37 (1868).

[28] Bostwick v. Baltimore &c. R. Co., 45 N. Y. 712 (1871).

[29] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871).

[30] Maghee v. Camden &c. R. Co., *supra*, and see Cap. VII, § 139.

[31] Earle v. Cadmus, 2 Daly, 237 (1867); Hopkins v. Westcott, 6 Blatchf. 64 (1868).

[32] 54 N. Y. 496 (1873).

ceived at New York for transportation to plaintiffs at St. Louis, a package containing three gross or cases of "Shallenberger's pills," worth $113.50 per gross. The receipt or bill of lading contained a clause that the holder should not demand more than $50 for any loss or damage, "at which the *article fowarded* is valued, and which shall constitute the limit of the liability of the company." The three cases were each separately addressed to plaintiffs and were then wrapped up with a proper cover in a single package similarly addressed. Only one of the cases reached the plaintiffs. An action was brought to recover for the loss, and it was held that "the article forwarded" was the single package, and that plaintiffs were not entitled to recover $50 upon each of the missing cases; the court saying that if each of the three boxes had contained a different sort of thing and the defendant had known of this the case would have been altered. Under an agreement exonorating a carrier from liability for more than a certain amount upon a "single package," each package among a number inclosed in a box, which the carrier knows to contain such packages, is to be regarded as an independent package.[33] The word "package" is defined by the Supreme Court of Alabama as a small parcel or bundle whose appearance gives no adequate information of its contents. A hogshead of tobacco or a bale of cotton would not come within the term.[34] In a very recent case in Illinois three bales of furs were delivered to an express company for transportation, the receipt given by the company limiting its liability to $50 for any loss or damage to any "box, package or thing," unless the just and true value thereof was therein stated. It was held that the shipper, even though no disclosure of the value had been given, was entitled to recover $50 on each of the three bales.[35]

[33] Read v. Spaulding, 5 Bosw. 395 (1859), and see Wyld v. Pickford, 8 M. & W. 443 (1841).

[34] Southern Express Co. v. Crook, 44 Ala. 468 (1870).

[35] Boskowitz v. Adams Express Co., 9 Cent. L. J. 389 (1879).

§ 159. *Baggage.*—A notice contained in an advertisement of the rate of fare for traveling in a coach in the following words, "All baggage at the risk of the owners," does not apply to packages of goods generally carried in such coach, but is to be confined to trunks and other baggage of persons traveling therein.[36] Independent of contract and notice a carrier is only liable as such for the "baggage" of passengers. The cases showing what is "baggage" are numerous.[37] Where the advertisement of a carrier stated that passengers were "prohibited from taking anything as baggage but their wearing apparel, which will be at the risk of the owner," and the trunk of a passenger contained specie, and the extra weight of his baggage was paid for and taken charge of by the agents of the carrier, it was held not incumbent on the passenger to inform the carrier of its contents, unless he was inquired of; that it was immaterial whether the trunk was to be considered as baggage or freight, and that the carrier was liable for its loss through the negligence or fraud of its agents.[38]

§ 160. "*Breakage.*"—See "Leakage and Breakage."

§ 161. "*C. O. D.*"—Some courts have taken judicial notice of the signification of these words,[39] while others have required parol evidence to explain their meaning.[40] The letters "C. O. D." refer to the value or price of the package which, as marked on it, is to be *collected on de-*

[36] Beckman v. Shouse, 5 Rawle, 179 (1835); Dwight v. Brewster, 1 Pick. 50 (1822).

[37] See New York Cent. R. Co. v. Fraloff, 9 Cent. L. J. 432 (1879). See also *post*, § 187, "Owner's Risk."

[38] Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67 (1851).

[39] These letters are by no means cabalistical. They have no occult nor mysterious meaning. In the ordinary commerce of the country these letters have acquired a fixed and determinate meaning, that courts and juries from their general information will readily understand what is meant thereby when averred in a pleading without explanation. United States Express Co. v. Keefer, 59 Ind. 263 (1877); American &c. Express Co. v. Schier, 55 Ill. 140 (1870); American Express Co. v. Lesem, 39 Ill. 312 (1866).

[40] "The letters 'C. O. D.,' followed by an amount in dollars, have

livery and transmitted to the consignor. They have nothing to do with the transportation charges,[41] nor do they affect the character of the shipment. The duty to transport safely remains the same. But if the consignee neglects or refuses to take the property and pay the money, the former remains in the carrier's hands subject only to his liability as a warehouseman.[42]

§ 162. "*Contents Unknown.*" See "Value and Contents Unknown."

§ 163. "*Damage.*"— A condition in a bill of lading exempting a carrier from liability for "any damage" is to be read as if followed by the clause "if not occasioned by his negligence or that of his servants." In an English case goods were shipped on board a steamer under a bill of lading which contained an exception from liability from "breakage, leakage or damage." The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo, but that there were two donkey engines on deck near the place where the goods were stowed, in lubricating which oil was used. There was no direct evidence how the injury to the goods occurred. The court held that from these facts a jury was justified in finding the existence of negligence.[43] So where the bill of lading contained a clause: "The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance," it was held that "damage" would include damage to the goods amounting to a total loss or de-

come to be well understood in the community and by the public, but perhaps could not, without the aid of extrinsic evidence, be read and interpreted by the courts; that is their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which those letters are used, in the connection in which they are found, or the contract to be implied from them. It was certainly competent to explain them and thus remove all ambiguity by parol evidence." Collender v. Dinsmore, 55 N. Y. 200 (1873).

[41] American &c. Express Co. v. Schier, 55 Ill. 140 (1870).

[42] Gibson v. American &c. Express Co., 1 Hun, 387 (1874).

[43] Czech v. General Steam Nav. Co., L. R. 3 C. P. 14; 37 L. J., C. P. 3; 16 W. R. 130; 17 L. T. (N. S.) 246 (1867). See also *ante*, Cap. VI.

struction of them, but did not apply to the case of the abstraction of the goods.[44] In this country it has been held that a release of a railroad company from liability for "damage to goods while in transit" will not extend to a total loss of them by fire while in the company's warehouse at an intermediate station.[45]

§ 164. "*Dangers Incident to the Navigation of the River.*—See "Dangers of Navigation."

§ 165. "*Dangers of Navigation.*"—And herein "Dangers Incident to the Navigation of the River," "Dangers of the Lake," "Dangers of the River," "Dangers of the Seas," "Inevitable Accidents," "Perils of the Lake," "Perils of the River," "Perils of the Seas" and "Unavoidable Accidents." See also "Unavoidable Accidents." —At first the exception which shipowners were accustomed to insert in their contracts was neither lengthy nor obscure, consisting simply of the words "the dangers of the seas," [46] and in this respect differed greatly from the modern bill of lading.[47] But in consequence of a ruling made

[44] Taylor v. Liverpool &c. Steam Co., L. R. 9 Q. B. 546 (1874).

[45] Menzell v. Railway Co., 1 Dillon, 531 (1870).

[46] Abbott on Shipping, 6th Am. ed. 401. The exception of the "dangers of the seas" is found in bills of lading as early as the reign of Charles the First. Pickering v. Barkley, 1 Style, 132 (1687).

[47] The receipts and bills of lading now used by common carriers are well characterized by Judge Redfield as the *ne plus ultra* of the ingenious devices of the common carrier craft in finding some mode of escape from all just responsibility. Examples of the modern bill of lading are given below, in the receipts of four of the largest express companies in this country.

[READ THIS RECEIPT.] "UNITED STATES EXPRESS CO.

"Received from———, at———, the following articles, which we undertake to forward to the point nearest to destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed, that the said UNITED STATES EXPRESS COMPANY are not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package or thing, for over $50, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God or of the enemies of the Government, the restraint of governments, mobs, riots, insurrections or pirates, or from any of the dangers incident to a time of war; nor upon any property or

thing unless properly packed and secured for transportation; nor upon fragile fabrics, unless so marked upon the package containing the same; nor upon any frabrics consisting of or contained in glass. If any sum of money, besides the charge for transportation, is to be collected from the consignee on delivery of the property described herein, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property, while in its possession for the purpose of making such collection, shall be that of warehousemen only."

"AMERICAN EXPRESS COMPANY.

"Received of———, 187 , the property hereinafter described:——— which we undertake to forward to the nearest point of destination reached by this company, subject expressly to the following conditions, namely: This company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the acts of God or of the enemies of the government, the restraints of government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war. Nor shall this company be liable for any default or negligence of any person, corporation or association to whom the above described property shall or may be delivered by this company, for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this company, and any such person, corporation or association is not to be regarded, deemed or taken to be the agent of this company for any such purpose, but on the contrary such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this company received the property above described. It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars or of any steamboat upon which said property shall be placed for transportation; nor by the neglect or refusal of any railroad company or steamboat to receive and forward the said property. It is further agreed that this company are not to be held liable or responsible for any loss of, or damage to said property or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants; nor in any event shall this company be held liable or responsible; nor shall any demand be made upon them beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein; nor upon any property or thing unless properly packed and secured for transportation; nor upon any fragile fabrics unless so marked upon the package containing the same; nor upon any

fabrics consisting of or contained in glass. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him at expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection, shall be that of warehousemen only. In no event shall this company be liable for any loss or damage unless the claim thereof shall be presented to them in writing at this office within ninety days after this date, in a statement to which this receipt shall be annexed. The party accepting this receipt hereby agrees to the conditions herein contained. The American Express Company assume no liability for delays, losses or non-delivery beyond their lines."

[DOMESTIC BILL OF LALING.] "ADAMS EXPRESS COMPANY. ——187 . Received of——, value——, for which this company charges——Marked——, which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation. It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroad, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company. And if the same is intrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do), such person or company so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable, and the Adams Express Company shall not be, in any event, reponsible for the negligence or non-performance of any such company or person, and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained, shall extend to and inure to the benefit of each and every company or person to whom the Adams Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event shall the Adams Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office, within thirty days after this date

in a statement to which this receipt shall be annexed. All articles of glass or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection or riot, or the dangers incident to a time of war, or by any riotous or armed assemblage. If any sum of money, besides the charge for transportation, is to be collected from the consignee on delivery of the above described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection shall be that of warehousemen only."

[READ THIS RECEIPT.] "SOUTHERN EXPRESS COMPANY.

["Domestic Bill of Lading.] Received of———, valued at——dollars, and for which amount the charges are made by said company, marked ———. Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation. It is a part of the consideration of this contract, and it is agreed, that the said express company ARE FORWARDERS ONLY, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the CARRIERS to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in store, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said express company or their servants, *unless specially insured by it and so specified on this Receipt*, which insurance shall constitute the limit of the liability of the SOUTHERN EXPRESS COMPANY in any event; and if the value of the property above described is not stated by the shipper at the time of shipment, and specified in this receipt, the holder hereof will not demand of the SOUTHERN EXPRESS COMPANY a sum exceeding *Fifty Dollars*, for the loss of, or damage to, each package herein receipted for. Nor shall the said company be held responsible for the safety of said property after its arrival at its place of destination. *And if the same is intrusted or delivered to any other Express Company or agent (which said Southern Express Company are hereby authorized to do) such Company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such, alone liable, and the Southern Express Company shall not be, in any event, responsible for the negligence or non-performance of any*

such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event shall the Southern Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office within thirty days after this date, in a statement to which this receipt shall be annexed. All articles of GLASS *or contained in Glass*, or *any of a fragile nature* will be taken at *Shipper's risk only*, and the shipper agrees that the company shall not be held responsible for any injury or breakage, or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by insurrection or riot, or the dangers incident to a time of war."

On the back of the receipt of this last company is the following:

"Southern Express Company hereby guaranty the safe arrival of the articles named in this receipt (seizure or stoppage by civil or military force excepted), at——, and in case of failure, or damage by fire, water, or the perils of navigation or transportation, to pay to—— or assigns, the sum of——dollars, or in proportion thereto as the amount of damages sustained bears to the value stated above. The same to be determined by three disinterested appraisers, if the parties can not otherwise agree; it being understood that this guarantee shall not extend beyond twelve hours after the arrival of the goods at the above named office or station."

In Redfield's American Railway Cases, Vol. 2, p. 244, the following form of a bill of lading said to be in use in a neighboring province is given:

"Shipped, in good order and condition by in and upon the screw steamship called the whereof is master for the present voyage or whoever else may go as master in the said ship and bound for being marked and numbered as in the margin, and are to be delivered from the ship's deck (where the shipowner's responsibility shall cease) in the like good order, and well conditioned (subject to the exceptions and restrictions of the following and under-mentioned clause) at the port of

(the act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of masters and mariners, restraints of princes and rulers, or people, sweating, insufficiency of package in size, strength or otherwise, leakage, breakage, pilferage, wastage, rain, spray, rust, frost, decay, contact with or smell, or evaporation from any other goods, inaccuracies in, obliteration, insufficiency or absence of marks, numbers or addresses, or description of goods shipped, injury to wrappers however caused, lighterage to or from the vessel, trans-shipment, jettison, explosion, heat, fire at any time or in any place, boilers, steam, machinery (including consequence of defect therein or damage thereto), collision, stranding, straining or other perils of the seas, rivers, navigation or

land transit of whatsoever nature or kind. And all damage, loss or injury arising from the perils or things above mentioned, and whether such perils or things arise from the negligence, default or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowner always excepted. With liberty to sail with or without pilots, to call at any intermediate port or ports for any purpose, and to tow and assist vessels in all situations. With liberty in the event of the steamer putting back into any port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail or in tow of any other vessel, or in any other manner which the shipowner shall think fit, and to ship or transship the goods by any other vessel) unto or to assigns, freight and primage payable by at the rate of with average accustomed.

"Weight, measure, gauge, quality, condition, quantity, brand, contents and value unknown, and the shipowner not accountable for the same.

"The owners of the vessel are not answerable for any discrepancies between the shipping-marks as described in the margin hereof and the actual marks on the property; nor for any differences between the contents of the packages and description of the same in the bill of lading; nor for any discrepancies between the mill brands of flour as herein described and those actually delivered.

"The goods to be received by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the sole expense and risk of the consignee in the warehouse provided for that purpose, or in the public store as the collector of the port of shall direct, and when deposited in the public store to be subject to rent, and the keys of the warehouse to be delivered to and kept in charge of the officer of customs under the direction of the collector, the collector of the port being hereby authorized to grant a general order for discharging immediately after the entry of the ship.

"Not accountable to any extent for bullion, specie, precious metals manufactured or unmanfactured, plated articles, glass, china, jewelry, articles used for jewelry, precious stones, trinkets, watches, clocks, timepieces, mosaics, bills, bank notes of any country, orders, notes or securities for payment of money, stamps, maps, letters, writings, title-deeds, paintings, engravings, pictures, statuary, silks, furs, lace or cashmere manufactured or unmanufactured, made up into clothes or otherwise, contained in any package or parcel, whatever may be the value of such articles, nor for any other goods of whatever description above the value of £100 per package, unless the value be therein expressed, and extra freight as may be agreed on be paid.

"The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance; nor for any claim notice of which is not given before the removal of the goods; nor for claims for damage or detention to goods under through bills of lading, where the

damage is done or detention occurs whilst the goods are not in the possession of the shipowner; nor in any case for more than the invoice or declared value of the goods, whichever shall be the least.

"Goods of an inflammable, explosive or otherwise dangerous character, shipped without permission, and without full disclosure of their nature, may be seized and confiscated or destroyed by the shipowner at any time before delivery, without any compensation to the shipper or consignee.

"All fines, expenses, losses or damage which the shipowner or his agents or servants, or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or description of their contents, or the dangerous nature of such contents, shall be paid by the shipper or consignee as may be required, and the shipowner shall have a lien upon the goods for the payment thereof.

"The only condition on which glass will be carried is that the shipowner shall not be held liable for any breakage which may occur, whether from negligence or any other cause whatever.

"Freight, if payable by shippers, is due in full in exchange for bill of lading, or if payable by consignees on arrival of goods at place of destination, in exchange for delivery order, settlement in either case to be made without discount or abatement. Freight payable by shippers to be paid, ship lost or not lost. Freight payable by consignee to be paid at the current rate of exchange for bankers' sight bills on London on the date of the steamer's report at the custom house.

"Freight on goods to order, liquids and brittle or perishable goods, payable by shippers if required.

"This bill of lading, duly indorsed, to be given in exchange for delivery order.

"In case the whole or any part of the goods specified herein be prevented by any cause from going in said steamer the shipowner is only bound to forward them by succeeding steamers of this line.

"In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

"In witness whereof the master or agent of the said ship hath affirmed to bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void.

"Dated in 187 for agents."

"This," says the author above referred to, "seems to be a document which might do credit to any age or country for its exhaustive character in the way of exclusion of all possible responsibility. All we need say of such studious exclusion of all responsibility whatever on the part of the carrier is that it is so extreme in its terms of exclusion as at once to expose its real animus as being the absolute destruction of all possible responsibility on the part of carriers and not the mere restriction of it within reasonable limits. It would therefore more naturally have this disadvantage in coming before any court for adjudication, where we may expect the instincts of justice and fair dealing to prevail, that all con-

by the Court of King's Bench in 1795 [48] and which gave great alarm to carriers by water a more sweeping clause came into use. This clause which, according to Lord TENTERDEN, still prevails in England, is in these words: "The act of God, the King's enemies, fire and all and every other danger and accident of the seas, rivers and navigation of whatever nature and kind soever excepted." Where it is necessary to land the goods by boats from the ship, the further clause is added, "risk of boats so far as ships are liable thereto." [49] The phrases "perils of the seas," "perils of the river," "perils of the lake," "dangers of navigation,"

cerned would read upon the very face of the contract an unqualified and unblushing disposition on the part of the carrier to gain the utmost attainable exemption from all just responsibility, while at the same time deriving all the customary benefits of the undertaking. The nature of this bill of lading would seem almost to justify the grounds upon which some of the old cases attempt to vindicate the necessity of holding common carriers responsible for all losses occurring while the goods are in their custody, lest if any excuse were accepted, they might by combination with thieves, burglars and robbers palm off upon the court some fabricated defense. We are not unmindful on the other hand that the severity of the rule of responsibility upon carriers may seem to justify some degree of watchfulness on their part, but we can not suppose there is any necessity of their attempting to throw all the risk of transportation upon the freighter. It is reasonable and just that the carrier should assume all the risks which properly attach to his portion of the work of transportation, which will embrace all aids and appliances connected with the work."

[48] Smith v. Shepherd, Abbott on Shipping, 6th Am. ed. 384. In this case a flood having swept away a part of a bank on which vessels were accustomed to lie in safety, a vessel sunk, one of its masts remaining near the surface. The defendant upon sailing into the harbor struck against this mast, which not giving away forced his boat upon the bank where she struck, and in consequence of the flood having changed the bank, sunk. The defendant was held liable.

[49] In Johnston v. Benson, 4 Moore, 90, 1 B. & B. 454 (1819), goods were shipped at London to be conveyed to Jamaica. The goods were there sent on shore, according to the custom of the West India trade, in a shallop belonging to the ship, and lost by perils of the sea. The clause of exception in the bill of lading was in the following terms: "The act of God, and all and every other danger and accident of the seas, rivers and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." It was held that the shipowner was not liable for such loss under the bill of lading,

"dangers of the seas," [50] "dangers of the river," "dangers of the lake," "unavoidable dangers of the river," [51] "dangers incident to the navigation of the river," [52] "inevitable accidents" and "unavoidable accidents," [53] are convertible terms and will be considered together. They are such perils, dangers and accidents as are of an extraordinary nature and arise from irresistible force which can not be guarded against by the ordinary exertions of human skill and prudence,[54] and which are peculiar to the elements.[55] They are broader than the phrase "act of God," in that they include human agency.[56]

First. As to what are within the exceptions. The following have been properly held to be within one or other of these terms: Hidden obstructions in a river, such as logs,

as the saving clause extended to the same risk as if the goods had been on board the ship.

[50] Baxter v. Leland, Abb. Adm. 348 (1848); Jones v. Pitcher, 3 St. & P. 135 (1833).

[51] The Favorite, 2 Biss. 502 (1871).

[52] The Wathan, 13 Opin. Atty Gen. 119 (1869).

[53] Fowler v. Davenport, 21 Tex. 626 (1858); Marsh v. Blythe, 1 McCord, 360 (1821); Marsh v. Blyth, 1 N. & Mc. 170 (1818).

[54] The Reeside, 2 Sum. 567 (1837): Baxter v. Leland, 1 Abb. Adm. 348 (1848); Bearse v. Ropes, 1 Sprague, 331 (1856); Story on Bailments, § 512; 3 Kent, 216; The Niagara v. Cordes, 21 How. 7 (1858); Tuckerman v. Stephens &c. Transportation Co., 32 N. J. (Law) 321 (1867); Gilmore v. Carman, 1 S. & M. 279 (1843); Turney v. Wilson, 7 Yerg. 340 (1835); Gordon v. Buchanan. 5 Yerg. 71 (1833); Johnson v. Friar, 4 Yerg. 48 (1833); Hill v. Sturgeon, 28 Mo. 323 (1859); Tysen v. Moore, 56 Barb. 442 (1870). The phrase the "dangers of the seas" has been defined in a very late case as including all unavoidable accidents from which common carriers by the general law are not excused unless they arise from the act of God. Woods, J., in Dibble v. Morgan, 1 Woods, 406 (1871), and see Friend v. Woods, 6 Gratt. 189 (1849); but this definition is much too broad and is not the law.

[55] "This phrase might certainly be construed to mean dangers which arise on the sea, and it would then include every hazard and danger from the beginning to the end of the voyage of whatever kind. But the inclination of the courts is to interpret it as including only dangers which arise from the action of the elements, and those incident to that cause, rather than to include all that arise upon the sea." Merrill v. Arey, 3 Ware, 215 (1859).

[56] McArthur v. Sears, 21 Wend. 190 (1839).

rocks, snags and the like, which prudence could neither discover nor avoid;[57] a dense fog;[58] a deflection of the compass from accidental or unforeseen causes;[59] the careening of a vessel after her arrival at a wharf by which water enters her ports;[60] boisterous weather, adverse winds and low tides, causing delay;[61] a sudden squall or gust of wind;[62] the "blowing" of a vessel,[63] or the open-

[57] Turney v. Wilson, 7 Yerg. 340 (1835); The Keokuk, 1 Biss. 522 (1866); The Favorite, 2 Biss. 502 (1871); Redpath v. Vaughan, 52 Barb. 489 (1868), affirmed 48 N. Y. 655 (1871); Van Hern v. Taylor. 7 Rob. 201 (1844); 2 La. Ann. 587 (1847); Boyce v. Welch, 5 La. Ann. 623 (1850). The rule which imputes carelessness to a captain whose boat strikes a known rock or shoal, unless driven by a tempest (Abbott on Shipping, 258), is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of the western rivers. There each case must be governed by its own circumstances, and be tested by the course usually pursued by skilful pilots in such cases. Collier v. Valentine, 11 Mo. 299 (1848).

[58] But a shipper is not excused by the presence of a dense fog, although it is a danger of navigation, if the loss occur through negligence or want of care—as while running at a high rate of speed. The Rocket, 1 Biss. 354 (1860); The Portsmouth, 9 Wall. 682 (1869).

[59] But it must be clearly shown that the officers of the vessel understood and discharged their full duty. The Rocket, 1 Biss. 354 (1860).

[60] A vessel laden with goods arrived in port and was taken into a dock to discharge her cargo. For this purpose she was fastened by tackle on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew was discharged except the mate, and lumpers were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got into her ports, and the goods still on board were damaged: *Held*, that this was a loss within the exception in the bill of lading of "all and every the dangers and accidents of the seas and navigation." Laurie v. Douglas, 15 M. & W. 746 (1846).

[61] Lewis v. The Success, 18 La. Ann. 1 (1866).

[62] Slocum v. Fairchild. 19 Wend. 329 (1838), affirmed 7 Hill, 292 (1843). In The Lady Pike, 2 Biss. 141 (1869), where a boat having three loaded barges in tow had approached a bridge in fair weather too closely to back or stop, and was driven against a pier by a sudden and unexpected gust of wind, the owner was held not liable. But in a later case (The Mollie Mohler, 2 Biss. 505 (1871), affirmed 21 Wall. 230 (1874), where the same thing happened to a steamer, the weather being tempestuous, a different conclusion was reached by the same court.

[63] Crosby v. Grinnell, 9 N. Y. Leg. Obsr. 281.

ing of its seams caused by straining during a storm;[64] a loss occasioned by mistaking a shore light on a dark and stormy night;[65] damage done to cotton thread by dampness of the hold of a vessel, not occasioned by bad stowage or by any negligence of those employed in the conveyance of the goods.[66]

Damage by "sweating" of the cargo is within these exceptions. But not if it has arisen by negligent stowage, of which the case of *The Star of Hope*[67] is an example. In this case nuts in bags and boxes were shipped at New York to be delivered at San Francisco. It was shown on the trial that if nuts are stowed in the hold on this voyage they are very liable to be injured by sweat; that it is the almost invariable practice to carry them in the cabin or cabin state-rooms, and to enter them on the bill of lading as to be thus carried; and that if they are carried in the hold they are sometimes inclosed in water-tight oil-casks in order to keep them in proper condition. The packages in this case were all marked "in cabin state-room." The contract of the bill of lading was that the goods should be delivered in San Francisco "in good order and condition, dangers of the seas, fire and collision excepted." The goods were placed in the hold without notice to the shippers, and were damaged on the voyage by sweating. It was held by the Supreme Court of the United States that in view of the almost invariable practice as to the stowage of nuts on this voyage; of the well known fact that if stowed in the hold they are extremely liable to be injured by sweat, and of the marks and

[64] Rich v. Lambert, 12 How. 347 (1851); but see Bearse v. Ropes, 1 Sprague, 331 (1856).

[65] The Juniata Paton, 1 Biss. 15 (1852).

[66] "No doubt the unusual duration of the voyage on account of tempestuous weather and adverse winds in connection with the fact that it was one in which the ship passed from a northern to a southern latitude, and in a season of the year where the change from a cold to a warm climate must have been considerable, greatly increased the dampness, and also the influence of it upon goods liable to damage from that cause." Clark v. Barnwell, 12 How. 272 (1851).

[67] 17 Wall. 651 (1873).

directions on the packages in question in this case, it was culpable negligence in the master of the vessel to stow them in the hold, and that the vessel was liable accordingly.

A loss by a jettison occasioned by a "peril of the sea" is a loss by a "peril of the sea." In such case the sea-peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, or of the unseaworthiness of the vessel, the jettison is attributable to that fault or breach of contract, and not to the sea-peril, though that may also be present and enter into the case.[68]

Is a collision a "danger of navigation?" The weight of authority answers this question in the affirmative, but failing to make any distinction in the cases, remains inconclusive. The St. Louis, Cincinnati and Chicago, three river boats, start from different points at the same time, carrying boxes of tobacco, the property of A. The bills of lading in each case are alike, excepting "the dangers of the river and navigation." In each case the property is not delivered and A institutes three separate suits against the respective boats. The St. Louis answers, setting up the exception in the bill of lading, and alleging that at a bend in the river during a heavy fog she collided with The Cincinnati and was sunk, neither boat being in fault and everything having been done by the officers on each boat to prevent the collision. This allegation being proved is held a sufficient answer to the action.[69] In the proceeding against The Chicago the bill of lading with its conditions are pro-

[68] Lawrence v. Minturn, 17 How. 100 (1854); The Portsmouth, 2 Biss. 56 (1868), 9 Wall. 682 (1869); The Milwaukee Belle, 2 Biss. 197 (1869), *s. c.*, Ray v. The Milwaukee Belle, 18 Am. L. T. Rep. 311; Nemours v. Vance, 19 How. 162 (1856); Crosby v. Fitch, 12 Conn. 410 (1838). Where the vessel ran aground in sailing up the harbor in pursuit of a pilot boat, and the master broke open heavy casks of liquor to lighten the vessel, instead of throwing them overboard, it was held that the loss might under the circumstances be regarded as a "peril of the sea." Van Syckel v. The Ewing, Crabbe, 405 (1840).

[69] Plaisted v. Boston &c. Navigation Co., 27 Me. 132 (1847): The New Jersey, Olcott, 444 (1846); Marsh v. Blythe, 1 McCord, 360 (1821).

duced, and the loss of the property by a collision with The Cincinnati shown. The evidence shows that the collision was caused by the negligence of the defendant's officers in managing the boat, and could have been avoided by the exercise of due care. A verdict for the plaintiff, A, is held correct.[70] In the proceeding against The Cincinnati the preponderance of testimony establishes that the loss arose through the boat being run down by the negligence of the officers of The Chicago, but without the fault of the defendant. The bill of lading is in form as in the other cases. The defendant has judgment.[71] In the first and second of these cases the conclusions reached are clearly correct—because the danger of accidental collision is known to all who go to sea in ships and because of the oft-repeated principle that the exceptions in a bill of lading can not include negligent acts. But the third case, though supported by all the American authorities, can hardly stand. Not only is it difficult to bring it within the definition of the phrase used, but the reason for the exception is altogether absent. The exception was allowed to a carrier to protect him from the consequence of a disaster occurring in spite of his vigilance, and which would sweep away at one time his own as well as his employer's property. But for the negligent handling of

[70] Lloyd v. General Iron Screw &c. Co., 3 H. & C. 284; 10 Jur. (N. S.) 661; 33 L. J. Ex. 269; 12 W. R. 882; 10 L. T. (N. S.) 586 (1845); The City of Norwich, 3 Ben. 575 (1869); Grill v. General Iron Screw &c. Co., L. R. 1 C. P. 600; 12 Jur. (N. S.) 727; 35 L. J., C. P. 321; 14 W. R. 893 (1866), affirmed on appeal, L. R. 3 C. P. 476; 37 L. J., C. P. 205; 16 W. R. 796; 18 L. T. (N. S.) 485 (1868).

[71] Van Hern v. Taylor, 7 Rob. 201 (1844); 2 La. Ann. 587 (1847); Whitesides v. Thurlkill, 12 S. & M. 599 (1849). In Hays v. Kennedy, 41 Pa. St. 378 (1861), a firm shipped goods upon a river steamboat, the owners of which as common carriers contracted by their bill of lading to deliver at the place of destination safely and in good order, "the unavoidable dangers of the river, navigation and fire excepted." The boat was run into and sunk, and the goods lost, without fault on its part, but by reason of carelessness on the part of the other. In an action against the owners to recover the value of the goods, it was held that the loss was covered by the exception in the bill of lading, and that the plaintiffs were not entitled to recover.

the vessel causing the injury, the injured carrier himself has his remedy over. The American cases contain no mention of this distinction, though in a case decided in England at the beginning of this century where a loss had been caused by an unavoidable collision, and which seems to have escaped the notice of succeeding judges, Lord KENYON said "that if the defendants had been guilty of any negligence and it could have been proved that the accident could have been prevented, they would certainly have been liable, but they were exempt by the condition of the bill of lading from misfortunes happening during the voyage which human prudence could not guard against — against accidents happening without fault in either party." [72] Although Lord KENYON'S judgment is very obscurely reported, it must be taken for granted that the parties whom he was of opinion must be free from fault were the masters of the vessels which collided.

Second. As to what are not within these exceptions. And first it must be noticed that no losses, however accidental, can be brought within the exceptions, so as to excuse the carrier, which might have been avoided by the exercise of discretion and foresight.[73] In a very early case [74] the owner of

[72] Buller v. Fisher, 3 Esp. 67 (1800).

[73] Williams v. Branson, 1 Murph. (N. C.) 417 (1810); Spencer v. Daggett, 2 Vt. 92 (1829); Jones v. Pitcher, 3 St. & P. 135 (1833); Fairchild v. Slocum, 19 Wend. 329 (1838); Dibble v. Morgan, 1 Woods, 406 (1873); The Casco, Daveis, 184 (1842); The Rebecca, 1 Ware, 188 (1831); Christenson v. American Express Co., 15 Minn. 270 (1870). Running against a cape or continent can not be termed an "accident of the sea," which proper foresight and skill in the commanding officer might have avoided. Bazin v. Steamship Co., 3 Wall. Jr. 229 (1857). A loss occasioned by the master of a steamer attempting to enter a port in a dense fog, he not being compelled by any exigency to make the attempt, will not be attributed to "perils of the sea." The Costa Rica, 3 Sawy. 538 (1875).

[74] Williams v. Branson, *supra*. "Nor indeed is every loss proceeding from a natural cause to be considered as happening by a [danger of the river] for if a ship perish in consequence of striking against a rock or shallow the circumstances under which the event takes place must be considered in order to determine whether it happened by a [danger of

a boat was held liable for the loss of goods caused by his skipper having attempted to pass a dangerous bend in the river during a freshet, although by the bill of lading the "dangers of navigation" were excepted from his undertaking. So where a boat upon the Ohio river ran upon a stone and knocked a hole in its hull, it was held that the carrier was not discharged from liability by virtue of the clause in the bill of lading "the dangers of the river only excepted," but that in order to relieve himself from responsibility it was incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable.[75] An answer stating that while a barge was being towed in the usual channel of the river, it stuck fast, without stating that the bar was unknown, or could not have been avoided, does not show a loss from the "unavoidable dangers of the river."[76] The exception in a bill of lading of "dangers of the river which

the river] or by the fault of the master. If the situation of the rock or shallow be generally known and the ship not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master; or if the shallow were occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God or the perils of the sea." Taylor, J., in Williams v. Branson, *supra*. "Suppose for a moment the snag not hidden, or one which might have been discovered by the rippling of the water; or suppose the snag, though hidden, yet known to the patroons of the river craft, would an accident arising from it constitute any excuse? Surely not. Or suppose the snag, though new and hidden, to have been so weak that it could not have pierced the bottom of a sound hull. In none of these instances could it form an excuse for the carrier. Again, suppose the snag to pierce a sound boat, but to let in only so much water as by diligent exertion might be kept down, would the bare name of an accident by a snag throw a mantle over negligence or shield the carrier from the charge of after inactivity. Surely not." Richardson, J., in Steamboat Co. v. Bason, Harp. (S. C.) 262 (1824). Where carriers provide that they shall not be liable for unavoidable dangers of navigation, they mean dangers that are unavoidable by them, supposing that they have exercised all the precaution, care and skill that the law usually demands of common carriers. Hays v. Kennedy, 41 Pa. St. 378 (1861).

[75] Whitesides v. Russell, 8 W. & S. 44 (1844).

[76] The Ocean Wave, 3 Biss. 317 (1872).

are unavoidable," releases the carrier from losses caused by hidden obstructions newly placed in the river, such as human foresight could not discover and avoid; but if he knows of a new obstruction before an injury is caused by it, he must use increased caution; and if he could by any means have removed it he will be chargeable.[77]

Again, if the goods be badly stowed or put on deck without the owner's consent the exceptions will not save the carrier.[78] But where a bill of lading declares that the property is to be stowed on deck and excepts "perils of the seas," the exception must be construed with reference to the particular adventure which the contract of affreightment shows was contemplated by the parties; and under such bill of lading the question is not what in other circumstances could be deemed a "peril of the sea," but what is to be deemed such when operating on this vessel with this deck-load.[79] Under what circumstances the carrier may lose the benefit of the exceptions in his contract by delay or deviation has been considered in a former chapter.[80]

Where goods are damaged by water arising from an excepted peril, it is the duty of the carrier to exercise ordinary care and diligence to prevent the consequences of the injury, and where it would be of advantage he should open the package and dry the goods; and if such precautionary measures are not taken the carrier will be liable for the loss.[81] Where a steamboat in going through an inland passage grounded upon the reflux of the tide, and fell over so that bilge-water rose into the cabin and injured a box of books, it was held that the owners of the boat were responsible for this injury, though the bill of lading excepted

[77] Gordon v. Buchanan, 5 Yerg. 71 (1833); Johnson v. Friar, 4 Id. 48 (1833).

[78] The Rebecca, 1 Ware, 188 (1831); The Casco, Daveis, 184 (1842); The Newark, 1 Blatch. 203 (1846).

[79] Lawrence v. Minturn, 17 How. 100 (1854).

[80] *Ante*, Cap. VII.

[81] Chouteaux v. Leech, 18 Pa. St. 224 (1852); Bird v. Cromwell, 1 Mo. 81 (1821).

"dangers of the navigation," and though the grounding of the boat was unavoidable, as the carriers were bound to remove the books from the cabin before the water reached them.[82] If the voyage is broken up by reason of the perils of the sea, it is the duty of the carrier to trans-ship the cargo and forward it to its destination, if it can be done; and the disabling of the master and mate by illness will not exonorate him from responsibility.[83]

The carrier to make good his defense is bound to show that the damage arose from a sea-peril. It is not enough for him to show that it *might* have arisen from that cause; he must prove that it did;[84] and whether the loss happened by a peril of the sea or by the negligence of the carrier is in every case a question for the jury.[85] Where goods arrive in a damaged condition and it is apparent that the damage was in a great part caused by the carrier's fault, though to some extent would probably have been caused by the perils of the sea encountered by the vessel, but to what extent the carrier is unable to show, he will be held liable for the whole.[86] But although it appears that his boat was not sea-

[82] Steamboat Co. v. Bason, Harp. 262 (1824).

[83] Phelan v. The Alvarado, 4 Am. L. J. 332. In West v. The Berlin, 3 Iowa, 532 (1856), a contract was made in November for the immediate transportation of goods from Dubuque to St. Paul by steamboat, "unavoidable dangers excepted," "with the usual privileges." It was held that the captain had a right to store the goods until spring if by reason of the season the whole voyage was then impracticable, he having carried them as far as could reasonably be required.

[84] Hoffman, J., in The Compta, 4 Sawy. 375 (1877).

[85] Marsh v. Blyth, 1 N. & Mc. 170 (1818); Hammond v. McClure, 1 Bay, 99 (1790); Gordon v. Buchanan, 5 Yerg. 71 (1833); Humphreys v. Reed, 6 Whart. 435 (1841).

[86] Speyer v. The Mary Belle Roberts, 2 Sawy. 1 (1871). In deciding this case Hoffman, J., said: "The real difficulty in the case arises from the fact, which, however, is not conclusively established, that the cargo would have sustained some damage even if it had been properly stowed; but how much can not be known. We are thus forced to choose between two alternatives, either to hold the carrier responsible for damages, a part of which he is not accountable for, or else to deny the shipper any compensation for losses which in great part was caused by the carrier's fault. The former alternative must, in my opinion, be adopted. By his

worthy, yet the carrier may show that the loss was in fact occasioned by the excepted perils of the river and not by the unseaworthiness of the boat, and must have happened if that defect had not existed; but a delinquency which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurring which might have had an agency in producing it, will render him liable.[87]

Under an ordinary bill of lading the conveyance and delivery of the goods is a condition precedent to the liability of the shipper of the goods to pay freight. The clause "the dangers of the seas excepted," does not affect the question whether freight has been earned or not. Its effect is only to exempt the carrier from liability to pay for the cargo when lost through the dangers of the seas. And unless there is an express agreement to the contrary, freight paid in advance may be recovered back if the voyage is not performed, although prevented by the dangers of the seas and without fault.[88]

Subject to these conditions the following have been held not to be within these exceptions: A dampness or sweating of the hold of a vessel and shown to be the ordinary accompaniment of a voyage from southern to northern ports, and to result not from tempestuous weather but from occult at-

contract the carrier promised to deliver the goods in like order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was on him to show that the loss was occasioned by one of the causes which by law and the terms of his contract afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable he must show how much that portion is; and unable to exonerate himself *in toto* he should establish the degree and extent of the exoneration to which he is entitled. If he fails to do this, it seems to me that he must be held responsible for the whole damage."

[87] Collier v. Valentine, 11 Mo. 299 (1848).

[88] Phelps v. Williamson, 5 Sandf. 578, *s. c.*, 10 N. Y. Leg. Obsr. 272 (1852).

mospheric causes ;[89] the mere rolling of a vessel in a cross sea, an ordinary incident of every voyage ;[90] a mere leak not shown to have been caused by the irresistible action of the elements ;[91] damage caused by rats [92] or other vermin ;[93] theft or robbery unless piracy on the high seas ;[94] theft or robbery committed by persons coming on board the ship by consent of the master when she is not on the high seas, or by persons on board, is not within these terms ;[95] depredations on the ship's stores or cargo committed by her passengers or crew in consequence of a short allowance made necessary by the length of the voyage ;[96] the barratrous act of the crew in boring holes in the ship for the purpose of scuttling her ;[97] embezzlement ;[98] plundering of the ship by a custom house officer while in charge of it ;[99] the unkilful-

[89] Baxter v. Leland, Abb. Adm. 348 (1848).

[90] The Reeside, 2 Sum. 567 (1837).

[91] The Emma Johnson, 1 Sprague, 527 (1860); The Compta, 4 Sawy. 375 (1877).

[92] The Isabella, 8 Ben. 139 (1875); Kay v. Wheeler, 36 L. J. C. P. 180, L. R. 2 C. P. 302, 15 W. R. 495, 16 L. T. (N. S.) 66 (1867); Laveroni v. Drury, 22 L. J. Ex. 3, 8 Ex. 166, 16 Jur. 1024 (1852). Where the master of a vessel received skins to be carried from New Orleans to New York, there to be delivered in good order, the "dangers of the seas" excepted, and the skins were injured by rats, the court refused to admit evidence to show that according to mercantile usage and understanding injuries by rats were considered and treated as dangers of the sea. Aymar v. Astor. 6 Cow. 266 (1826).

[93] Cockroaches ate off and defaced the paper labels pasted on the outside covering of chests of tea, which injury embarrassed the assortment and delivery of the goods to the consignees and depreciated their market value. *Held*, that the damages were not the result of a "peril of the sea" or of any of the "dangers or accidents of navigation," within an exception to that effect in a bill of lading but were damages for which the ship and its owners were liable as insurers of the safe conveyance of the cargo. The Miletus, 5 Blatchf. 335 (1866).

[94] King v. Shepherd, 3 Story, 349 (1844); Tenderden on Shipping, pt. 3, c. 3, § 9, p. 244; Abbott on Shipping, pt. 3, c. 4, § 1, p. 252.

[95] King v. Shepherd, 3 Story, 349 (1844).

[96] The Gold Hunter, Blatchf. & H. 300 (1832).

[97] The Chasca, L. R. 4 Adm. 446, 23 L. T. (N. S.) 838, 44 L. J. Adm. 17 (1875).

[98] King v. Shepherd, 3 Story, 349 (1844).

[99] Schieffelin v. Harvey, Anth. 56, 6 Johns. 170 (1810).

ness of the pilot;[100] the desertion or insubordination of seamen;[101] an accidental fire;[102] the explosion of a boiler of a steamship;[103] low water in a river,[104] or at the entrance to a harbor;[105] the shifting of a buoy;[106] an injury to cargo

[100] Harvy v. Pike, N. C. Term Rep. 82, 7 Am. Dec. 698 (1817).

[101] The Ethel, 5 Ben. 154 (1871).

[102] Gilmore v. Carman, 1 S. & M. 279 (1843). Sharkey, C. J.: "It is not a danger which proceeds from or is peculiar to the river. It arises from the means used in propelling the boat, and not from any obstacle or impediment in the river. The boat itself is the depository of the agent which produces its own destruction. If the owner chooses to employ this agent he can not with propriety say that it is productive of a danger incident to the navigation of the river. This is a danger produced by human agency; it may be counteracted by human sagacity and prudence." See also Garrison v. Memphis Ins. Co., 19 How. (U. S.) 312 (1856); Merrill v. Arey, 3 Ware, 215 (1859); Cox v. Peterson, 30 Ala. 608 (1857); Union Mutual Ins. Co. v. Indianapolis &c. R. Co., 1 Disney, 480 (1857). It is held in Alabama that a carrier may show by parol that an exception of "dangers of the river" as embodied in a bill of lading by usage and custom includes dangers of fire. Hibler v. McCartney, 31 Ala. 501 (1858); Sampson v. Gazzam, 6 Port. 123 (1838); Ezell v. Miller, Id. 307 (1837); Ezzell v. English, Id. 311 (1837); McClure v. Cox, 32 Ala. 617 (1858); Jones v. Pitcher, 3 St. & P. 135 (1833). But this is contrary to the weight of authority. See *ante*, Cap. V, § 125.

[103] The Mohawk, 8 Wall. 153 (1868). For perils arising on the sea are not necessarily perils arising from the sea. The Edwin, 1 Sprague 477 (1859); Bulkley v. Naumkeak Steam Cotton Co. 1 Cliff. 222 (1859), *s. c.*, on appeal, 24 How. 386 (1860), *contra*, Adams Express Co. v. Fendrich, 38 Ind. 150 (1871).

[104] Danger of navigation does not mean want of navigation. Cowley v. Davidson, 13 Minn. 92 (1868). "The obligation of this common carrier under this bill of lading was to deliver the goods at Shreveport without unnecessary delay, in good order and condition, unto the consignees or assigns, they paying the specified freight and no more, the dangers of the river and fire only excepted. Low water is not to be classed among the dangers of the river which absolve the carrier from this conventional obligation." Hatchett v. The Compromise, 12 La. Ann. 783 (1857); Broadwell v. Butler, 1 Newb. 171, 6 McLean, 296 (1854); Mahon v. The Olive Branch, 18 La. Ann. 107 (1866). An exception of "dangers of the river" will not cover the case of a loss of goods by fire in a warehouse where they had been deposited by the carrier on account of low water in the river which prevented his vessel from prosecuting the voyage to the place of destination. Cox v. Peterson, 30 Ala. 608 (1857).

[105] Transportation Co. v. Downer, 11 Wall, 129 (1870).

[106] Reeves v. Waterman, 2 Speers, 197 (1843).

occasioned by contact with other cargo;[107] or by want of ventilation.[108]

In *The Patria*,[109] the master of a North German vessel under a North German charter party, gave a bill of lading for goods shipped on board his vessel, in South America, as part of a general cargo to be delivered in North Germany to English consignees. The English language, money and weights were used in the bill of lading, which contained the proviso "the dangers of the sea only excepted." The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France and Germany. It was held by Sir ROBERT PHILLIMORE that the master was liable, only one event excusing him, which event was not present in this case. In *Spence v. Chodwick*,[110] to an action by a shipper of a bill of goods under a bill of lading for carrying goods to be shipped on board a ship lying at Gibralter and bound for London, calling at Cadiz from Gibralter to London, "the act of God, and all and every other danger and accident of the seas, rivers and navigation of what nature and kind soever excepted," the defendant pleaded that the ship, in the course of her voyage to London, called at Cadiz, and that the goods were within the jurisdiction of the officers of customs of Cadiz, and within the jurisdiction of a court held at Cadiz, and that the goods were by the authorities having jurisdiction

[107] Casks of bleaching powder were stowed in the hold of a vessel against the skin, without dunnage. Water, which came in through the deck and water ways, reached the casks and wet their contents, which rotted the wood of the casks. The casks were stove by reason of this, and the bleaching powder was mixed with the water, and this water reached some bundles of bags and injured them. The bags were being carried under a bill of lading which excepted the "dangers of the seas." *Held*, that the injury to the bags was not caused by the dangers excepted and that the ship was liable for the damage. The Antoinetta C., 5 Ben. 564 (1872); and see Daggett v. Shaw, 3 Mo. 264 (1833); The Freedom, L. R. 3 P. C. 594, 24 L. T. (N. S.) 452 (1871).

[108] The Freedom, L. R. 3 P. C. 594, 24 L. T. (N. S.) 452 (1871).

[109] L. R. 3 Adm. 436, 24 L. T. (N. S.) 849 (1871).

[110] 10 Q. B. 517, 11 Jur. 872, 16 L. J. Q. B. 313 (1847).

in that behalf and according to the law of Spain, lawfully taken out of the ship and detained, without the fault of the shipowner, on a charge which was duly preferred in the court; and by a decree of the court made according to the law of Spain were confiscated. It was held by the Court of Queen's Bench that the loss was not within any of the exceptions in the bill of lading, but was occasioned by inevitable necessity, against which the shipowner ought to have provided by his contract, and that the plea afforded no answer, inasmuch as it did not allege any wrongful act or default by the shipper, or knowledge by him that the goods were contraband at Cadiz, nor that they were taken to Cadiz by his desire.

§ 166. "*Dangers of the Lake.*"—See "Dangers of Navigation."

§ 167. "*Dangers of the River.*"—See "Dangers of Navigation."

§ 168. "*Dangers of the Roads.*"—In bills of lading containing an exemption from "the dangers of the seas, roads and rivers," the word "roads" is construed to mean marine roads. It might, however, be held to include roads on land, but if so it would be restricted to those dangers which are immediately caused by roads, such as the overturning of carriages in rough and precipitous places. Thus in *DeRothschild v. Royal Mail Steam Packet Company*,[111] where the carrier received goods at Panama to be delivered at London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, *roads* and rivers, of what nature or kind soever excepted," and the goods were carried by the company across the isthmus of Panama to Chagres, where they were shipped to Southampton and there placed in a railway truck whence they were secretly stolen in the course of their transit to London, it was held that the carrier was liable notwithstanding the exception.

[111] 7 Ex. 734, 21 L. J. Ex. 273 (1852).

§ 169. "*Dangers of the Seas.*"— See "Dangers of Navigation."

§ 170. "*Deficiency in Quantity.*"— A stipulation in a bill of lading that "any damage or deficiency in quantity, the consignee will deduct from the balance of freight due the carrier," does not import a guaranty that the carrier has received the whole quantity of goods specified therein, nor an agreement to pay for any portion which may be deficient. The words "deficiency in quantity" relate to the property shipped and not to the amount as contained in the bill of lading.[112]

§ 171. "*Depot.*"— The word "depot" in a clause exempting the carrier from "unavoidable accidents of the railroad and of fire in the *depot*," is a broad one, and includes every place where the carrier is accustomed to receive, deposit and keep ready for transportation or delivery, goods and merchandise.[113]

§ 172. "*Errors.*"— In *Sanford v. Housatonic Railway Company*,[114] a receipt given by the consignees of goods to the carrier, acknowledging their receipt in good order, and in which the consignees were requested to notice any "errors" therein in twenty-four hours, or the carrier would consider himself discharged, was held not to estop the consignor from suing the carrier for damages caused by negligence in transporting the goods, although no notice was given thereof to the carrier. The word "errors" in this connection means mistakes, and not waste or negligence.

§ 173. "*Escapes.*"— "Notwithstanding the stipulation in the contract that defendant should not be responsible for damages occasioned by 'escapes from any cause whatever,' the defendant would still be liable for an "escape' occasioned by its negligence, or where such negligence was an active and co-operating cause in producing it. How far the failure of defendant to seal the car when requested by

[112] Meyer v. Peck, 28 N. Y. 590 (1864).
[113] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871).
[114] 11 Cush. 155 (1853),

plaintiff to do so, may have contributed to the escape of the animal, was a question for the jury." [115]

§ 174. "*Extraordinary Marine Risk.*" — In a charter-party by which a vessel was hired by the government for the purpose of plying in the harbor of Port Royal, S. C., or for such other services as the government might designate, it was stipulated that in case the vessel, while executing the orders of the government, should be destroyed or damaged, or by being compelled by the government to run any "extraordinary marine risk," the owner should be indemnified. In complying with the orders of the harbor master at Port Royal, the vessel struck upon the fluke of a sunken anchor in the harbor, and was sunk. It was held that the risk which the vessel thus incurred was not an "extraordinary marine risk" within the meaning of the charter-party. It was an ordinary risk, which every vessel that enters a harbor runs, and which every marine policy covers.[116]

§ 175. "*Feed, Water and Take Proper Care of.*" — The carrier of stock takes upon himself the duty of watering, feeding and bestowing such care upon them as they may require. But by special contract and in consideration of reduced fare or other benefits this duty may be assumed by the shipper. In such case, for a loss happening from a want of attention in this respect, the carrier is not responsible if he has been guilty of no negligence — "if he furnished adequate carriage, afforded reasonable opportunities to the owner or his agent to care for the stock, and subjected them to no unnecessary delay in transportation." [117]

§ 176. "*Fire.*" — As we have seen, an accidental fire, unless caused by lightning, is not the "act of God." [118] To protect himself from an accidental loss of this charac-

[115] Norton, J., in Oxley v. St. Louis &c. R. Co., 65 Mo. 629 (1877).
[116] Leary v. United States, 14 Wall. 607 (1871).
[117] South &c. Alabama R. Co. v. Henlein, 52 Ala. 606 (1875).
[118] *Ante*, Cap I, § 6; McArthur v. Sears, 21 Wend. 190 (1839); Hale v. New Jersey Steam Nav. Co., 15 Conn. 539 (1843).

ter the carrier must expressly contract for the exemption, for it is not included in the exceptions of "unavoidable dangers," [119] "dangers of the river," [120] "perils of the sea," [121] "perils of the river" [122] or the like. But even where expressly excepted, it will not protect against a destruction of this character originating in the negligence or want of care in the carrier or his servants; [123] and this is so even where a carrier's contract may include his negligence, as in New York.[124] If placing goods in an open car is negligence, notice to the owner at the time of the shipment that they would be placed in such a car will not relieve the carrier from liability for the loss.[125] Where a steamer engaged in transporting goods takes fire in consequence of a collision caused by the negligence of those having her in charge, and the cargo is thereby lost, the owners of the cargo may recover against the steamer, even though the bills of lading expressly except the vessel and her owners from liability for loss in case of fire. The fire in such a case is a mere incident of the collision.[126] The failure of a steamboat carrying passengers and freight on an inland river to have the cotton on its decks "protected by a complete and suitable covering of canvass or other suitable material to prevent ignition from sparks," as required under a

[119] Union Mutual Ins. Co. v. Indianapolis &c. R. Co., 1 Disney, 480 (1857).

[120] Cox v. Peterson, 30 Ala. 608 (1857).

[121] Merrill v. Arey, 3 Ware, 215 (1859).

[122] Gilmore v. Carman, 1 S. & M. 303 (1843); Garrison v. Memphis Ins. Co., 19 How. 312 (1856).

[123] New Orleans Mut. Ins. Co. v. New Orleans &c. R. Co., 20 La. Ann. 302 (1868); Levy v. Pontchartrain R. Co., 23 La. Ann. 477 (1871); York Co. v. Central Railroad, 3 Wall. 107 (1865); Michigan &c. R. Co. v. Heaton, 37 Ind. 448 (1871); Grey v. Mobile Trade Co., 55 Ala. 387 (1876); Bank of Kentucky v. Adams Ex. Co., 93 U. S. 174, 4 Cent. L. J. 35 (1876); Erie R. Co. v. Lockwood, 28 Ohio St. 358 (1876).

[124] Condict v. Grand Trunk R. Co., 54 N. Y. 500 (1873); Lamb v. Camden &c. R. Co., 2 Daly, 454 (1869); Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1872); Stedman v. Western Trans. Co. 48 Barb. 97 (1866).

[125] Montgomery R. Co. v. Edmonds, 41 Ala. 667 (1868).

[126] The City of Norwich, 3 Ben. 575 (1869).

penalty by statute,[127] renders the carrier liable for a loss by fire, although the bill of lading exempts "dangers of the river and fire."[128]

In a bill of lading of a steamboat the word "fire" means any fire and is not restricted to fire originating from the boat's furnace.[129] Nor is it qualified by "unavoidable" in the clause "fire and all other unavoidable accidents," and therefore such an exception will cover a loss by fire whether unavoidable or not, if not negligent.[130] Where goods were sent by carriers by water over a line which included railway carriage also, the bill of lading given by the carrier by water excepting "dangers of navigation, fire and collisions on the lakes and rivers and on the Welland canal," it was held that this limitation did not extend to a loss by fire on a railroad.[131]

§ 177. "*Forward.*"—To "forward" means to "send" and not to carry. Therefore when an express company agrees to "forward" a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of forwarders, and through charges not being paid, the liability of the company as a common carrier ceases at the end of its route, when the package arrives there in safety and is delivered with proper instructions to another responsible carrier upon the line to the point of destination.[132] In a Kansas case,[133] the St. Louis, Kansas City & Northern Railway Company, owning and operating a line of railroad from Kansas City to Mexico and there connecting with another road running to Chicago, made a

[127] 14 U. S. Stat. at Large, 227.

[128] Grey v. Mobile Trade Co., 55 Ala. 387 (1876).

[129] Swindler v. Hilliard, 2 Rich. (S. C.) 216 (1846).

[130] Colton v. Cleveland &c. R. Co., 67 Pa. St. 211 (1870).

[131] Barter v. Wheeler, 49 N. H. 9 (1869).

[132] Reed v. United States Express Co., 48 N. Y. 462 (1872). Compare Illinois Cent. R. Co. v. Frankenburg, 54 Ill. 88 (1870); Wahl v. Holt, 26 Wis. 703 (1870).

[133] St. Louis &c. R. Co. v. Piper, 13 Kas. 505 (1874), and see further *post*, Cap. X.

contract to "forward" certain cattle from Kansas City to Chicago, stipulating therein that the shipper should "take care of the cattle while on the trip," and that "it and connecting lines over which such freight might pass should not be liable for any loss, damage or injury which might happen in loading, forwarding or unloading, by suffocation * * * or by any other cause except gross negligence," and that "it and connecting lines should be deemed merely forwarders, and not common carriers, and only liable for such loss * * * as might be gross negligence only, and not otherwise." It was held that the St. Louis, Kansas City & Northern Railway Company was liable as a carrier for the transportation the entire distance, and was responsible for any loss or injury occurring from ordinary negligence, whether such negligence was on its own or a connecting line.

§ 178. "*Freezing.*"— Notwithstanding this exception a carrier is still liable for a loss from this cause arising from a failure to forward the goods with reasonable dispatch. A bill of lading for a carload of potatoes had written upon its face the words "owners' risk freezing." During a delay of ten days on the road the potatoes were injured by frost. The delay was caused by a strike among the defendants' engineers, which originated in consequence of the employment of an engineer not of the brotherhood, their places being filled as rapidly as other engineers could be found to take them. The company was held liable for the damage.[134]

§ 179. "*From Whatever Cause.*" — An agreement to take the risk of injury arising "from whatever cause" will not include an injury caused by negligence. In *Smith v. New York Central Railroad Company*,[135] the plaintiff who was in charge of a quantity of live stock which the defendants were transporting on their road, had accepted a stock pass which contained a condition that the "persons riding

[134] Read v. St. Louis &c. R. Co., 60 Mo. 199 (1875); Wolf v. American Express Co., 43 Mo. 421 (1869).

[135] 29 Barb. 132 (1859); affirmed 24 N. Y. 222. (1862).

free to take charge of the stock do so at their own risk of personal injury from whatever cause." "There are risks incident to the transaction," said HOGEBOOM, J., "to which this clause might naturally and properly apply; risks from the stock themselves; risks from detentions along the way; risks from the necessity of moving about the cars for the purpose of feeding and taking care of the stock; risks from the increased difficulties and perils of operating a train of cars heavily incumbered with live stock; risks incident to the management of every railroad train, and inherent in the very nature of the business, and not always possible to be avoided even by the exercise of the utmost precaution. Against such risks we may well conclude the parties intended to contract; but to assume that the passenger intended to issue a license for misconduct or pay a premium for negligence is more than I am willing to believe."

§ 180. "*Good Order and Condition.*" — The admission in a bill of lading that the goods were received in "good order and condition," refers only to their external appearance; the carrier is not concluded by this statement, but may explain or contradict it by parol evidence. "The adoption of the principle that the bill of lading is conclusive on the carrier not only as to the apparent but also as to the actual condition of the goods would impose on him the necessity, for self-protection, of opening every box of merchandise to examine and ascertain the condition of its contents before he receives it. This would not only be inconvenient but impracticable on the part of steamboat owners, on account of the vast carrying business on the rivers. The injury that would be inflicted on the owners of freight by the process that it would be subjected to in consequence of such a requisition is also a cogent argument against it. The bulk of every package would have to be broken up and examined, and the contents of every box of merchandise of the most delicate texture opened and handled before a bill of lading could be safely signed. Public policy, therefore, prohibits a rule which would be

productive of such results, and which, instead of benefitting, would inflict an injury upon the community."[136] Thus the receipt for bales of cotton "in good order and well conditioned," does not warrant the internal quality or condition of the cotton in the bales.[137] And the clause "shipped in apparent good order and condition, five cases of merchandise," was held an admission only that the cases contained merchandise, and were outwardly sound.[138] But where a bill of lading was given for a box of marble tops, "in good order and well conditioned," it was held that the burden of proof was upon the carrier to show that the marble was broken when it came into his hands; for here there was the carrier's admission that the specified articles were in the box and in good order.[139] The word "apparent" inserted before the word "good," does not change its legal effect.[140]

§ 181. "*Heat, Suffocation and the Other Ill Effects of Being Crowded.*"— In a contract for the transportation of

[136] Breck, J., in Gowdy v. Lyon, 9 B. Mon. 112 (1848); Keith v. Amende, 1 Bush. 455 (1866); Barrett v. Rogers, 7 Mass. 297 (1811); The Missouri v. Webb, 9 Mo. 193 (1845); Tierney v. New York Cent. R. Co., 10 Hun, 569 (1877). "The receipt of the bill of lading is an admission that the goods were when received in apparent good order, but it is not conclusive as to their actual condition. It makes a *prima facie* case against the ship, and gives the libellants a right to recover unless this case is overcome by the evidence. The burden of admission rests upon the ship until it is shown that the appearance and condition of the goods at the time of their discharge are consistent with the actual existence in the packages of the cause of the damage when the shipment was made, without discovery by the ship's agents, acting in good faith and with ordinary care, while taking the cargo on board." Waite, C. J., in Archer v. The Adriatic, 9 Cent. L. J. 201 (1879); Carson v. Harris, 4 G. Greene, 516 (1854); Mitchell v. United States Express Co., 46 Iowa, 214 (1877); West v. The Berlin, 3 Iowa, 532 (1856); The Freedom, L. R. 3 P. C. 594 (1871); The Olbers, 3 Ben. 148 (1869); Vaughan v. Six Hundred and Thirty Casks, 7 Ben. 506 (1874). A wagoner's receipt for goods in good order is *prima facie* evidence that they were so when received. Austin v. Talk, 20 Texas, 164 (1857).

[137] Bradstreet v. Heran, 2 Blatchf. 116 (1849).

[138] Abbott on Shipping, 339; The California, 2 Sawy. 12 (1871).

[139] Price v. Powell, 3 N. Y. 322 (1850).

[140] The Oriflamme, 1 Sawy. 176 (1870).

cattle, on account of the peculiar nature of the carriage of live animals, these words have been held in New York to exempt the carrier from liability for injuries by heat, etc., the result of his own negligence.[141]

§ 182. "*Inevitable Accidents.*"— See "Dangers of Navigation," "Unavoidable Accidents."

§ 183. "*Inherent Deterioration.*"— This phrase in a bill of lading will not excuse the delivery of fruit in a decayed condition, which it is shown was so stowed by the carrier as not to permit proper ventilation, and therefore rotted.[142]

§ 184. "*Leakage and Breakage.*"— The condition "not to be accountable for leakage or breakage" is inserted by the carrier to protect himself from unavoidable losses of this kind, leaving him still responsible for want of skill or care in the handling, stowage or delivery of the goods intrusted to him. "Ordinarily," says CRESSWELL, J., in apt language, "the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly; and he is responsible for 'leakage and breakage.' Here he expressly stipulates not to be accountable for 'leakage or breakage,' leaving the rest as before. That is the whole case."[143] Examples of this doctrine are given below.[144] The word "leakage" being intended only

[141] Cragin v. New York Cent. R. Co., 51 N. Y. 61 (1872), and see *ante*, Cap. VI, § 135-138, and see *post*, § 202.

[142] The America, 8 Ben. 491 (1876).

[143] Philips v. Clark, 2 C. B. (N. S.) 156, 3 Jur. (N. S.) 467, 26 L. J. C. P. 168 (1857); and see Steele v. Townsend, 37 Ala. 247 (1861); The Pereire, 8 Ben. 301 (1875); Six Hundred and Thirty Casks, 14 Blatchf. 517 (1878); The David and Caroline, 5 Blatchf. 266 (1865); The Delhi, 4 Ben. 345 (1870); Reno v. Hogan, 12 B. Mon. 63 (1851); The Invincible, 1 Low. 255 (1868); Dedekam v. Vose, 3 Blatchf. 44 (1853); Hunnewell v. Taber, 2 Sprague, 1 (1854); The Oriflamme, 1 Sawy. 176 (1870); The Olbers, 3 Ben. 148 (1869); Vaughan v. Six Hundred and Thirty Casks, 7 Ben. 506 (1874).

[144] Under a bill of lading containing a stipulation that oil, which is a part of the cargo, shall be wet twice a week, and also the clause "not accountable for leakage or stowage," the carrier is liable for loss of oil by leakage, caused by the casks not being properly wet. Hunnewell v. Taber, 2 Sprague, 1 (1854). Where an action was brought under a clause in a bill of lading "not accountable for breakage," to recover for

to protect the carrier from liability to compensate the owner of the goods for the waste occasioned by leakage, does

four millstones broken on the voyage, and two others that never came to the possession of the consignees, it was held that it was incumbent on the owners of the ship at least to show that the two missing stones were discharged upon the wharf and placed with the others on that part of it which had been selected for the libellant's goods, and that such proof being wanting the ship would be liable; while as to the four broken stones, the stowage being proved to have been good and no evidence of negligence being shown the carrier was not liable. Carey v. Atkins, 6 Ben. 562 (1873). Stoneware pipes were shipped on a vessel under a bill of lading excepting "dangers of the sea and navigation," but containing no exception of loss by breakage. They were in good order when received, were stowed properly and were handled carefully in loading and discharging, but some of them came to pieces when being discharged, from the development of cracks existing when the pipes were put on board or caused while on board by the "perils of the sea," the ship having met with bad weather. The consignee tendered the freight on the sound pipes delivered, which was refused, and freight was demanded on the whole, at the rate per ton specified in the bill of lading, and a libel was filed against the goods to recover the freight. *Held*, that as the goods were properly stowed with reference to their character and their apparent condition, the vessel was not liable for their breakage, and was entitled to hold all the goods till the full freight was paid. Vitrified &c. Sewer Pipes, 5 Ben. 402 (1871). Casks of plumbago were brought in different ships of a line under bills of lading which exempted the ship from damages resulting "from leakage or breakage, or from stowage, however such damages might be caused." On some of the bills of lading were memoranda that the casks were loose when shipped. The consignees brought suit against the owner of the vessel to recover for plumbago lost out of the casks, as they claimed by reason of injury to the casks from careless handling. *Held*, that the exemption in the bill of lading was not sufficient to exempt the owner from loss arising from his negligence; that in cases where the memoranda that the casks were loose were on the bill of lading, the presumption would be that any loss which occurred arose from such loose condition of the casks. Nelson v. Nat. Steamship Co., 7 Ben. 340 (1874). A railroad company transporting a mirror over its road at the "owner's risk as regards breakage," placed it along with agricultural implements and other heavy freight in a narrow passage way, through which drays and other vehicles were constantly passing. It was there struck by a passing dray and broken. The company was held liable for the loss. Missouri &c. R. Co. v. Caldwell, 8 Kas. 244 (1871). Where a bill of lading contained the clause "not accountable for breakage," and it appeared that certain cases under the bill had been placed flatwise and endwise, and that the contents of some had broken; though all were receipted for

not extend to damage caused by the liquid to other goods. So "breakage" will not cover damage done by the broken goods to other goods.[145] It is held in England that, negligence being absent, the condition as to leakage extends to all leakage, whether ordinary or extraordinary. In *Ohrloff v. Briscall*,[146] TURNER, L. J., said: "On the argument different views were suggested by counsel as to the meaning of the word 'leakage.' For the respondents it was contended that the word means only ordinary leakage (which according to the evidence amounts to one per cent.), and does not extend to extraordinary leakage, such as that in question, amounting to an alleged deficiency of 2,000 gallons. * * * * The learned judge of the admiralty court appears to have adopted the construction of the word 'leakage' contended for by the respondents. * * * But we do not think such a construction allowable. The condition that the shipowners are not to be accountable for leakage does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms. Nor are we aware of any authority for doing so." But in this country such a condition does not allow the carrier to deliver empty casks. The ordinary signification of "leakage," it is very properly said, is the loss of a part, not the whole.[147]

§ 185. "*Load and Unload.*"— A contract under which a shipper of stock agrees to "load and unload at his own risk," places upon him the risk of damage to his

before opening as in good order, but it not appearing that the breakage was caused by the fact that the cases had been piled flat and endwise: *Held*, that the consignees had failed to show that any damage had been done on the ship. The Delhi, 4 Ben. 345 (1870).

[145] Thrift v. Youle, L. R. 2 C. P. D. 432 (1877).

[146] L. R. 1 P. C. 231, 12 Jur. (N. S.) 675, 35 L. J. P. C. 63, 15 W. R. 202, 14 L. T. (N. S.) 873, 4 Moore, P. C. C. (N. S.) 70, *s. c.*, *sub nom*, The Helene, B. & L. 429 (1866).

[147] Brauer v. The Almoner 18 La. Ann. 266 (1866); Thomas v. The Morning Glory, 13 La. Ann. 269 (1858); Arend v. Liverpool &c. Steamship Co., 6 Lans. 459, *s. c.*, 64 Barb. 118 (1872).

property or to himself from the manner of loading or unloading. The condition does not, however, place any responsibility upon him during the transportation,[148] nor embrace loading or unloading at intermediate stations,[149] nor personal injuries which he may sustain from external causes, as where a shipper while engaged in loading his car was run into by another train.[150] Where by a contract for the carriage of live stock the owner took the risk of damage "in loading, unloading, conveyance and otherwise, whether arising from negligence or otherwise," and the bottom of the car dropped out, it was held that if the car was unfit the carrier was liable.[151]

§ 186. "*Loss.*"— A delivery of the goods by the carrier to a person not entitled to receive them is not a "loss" within the meaning of a contract between carrier and shipper that in the event of the "loss" of the goods "the value or cost of the same at the point and time of the shipment is to govern."[152] But a robbery is within this term — it not being confined to an accidental loss.[153] Where an express company gave a receipt containing a clause exempting it from "any loss or damage whatever unless claim should be made therefor within ninety days from the delivery to it," it was held that this clause had no application to a suit against the company for the non-delivery of the goods themselves, that not being a suit either for loss or damage.[154]

§ 187. "*Owner's Risk.*"— The term "owner's risk," in a contract for the transportation of goods, imports that the owner assumes the risks arising from the ordinary dan-

[148] Indianapolis &c. R. Co. v. Allen, 31 Ind. 394 (1869).

[149] Only at the *termini*. Penn v. Buffalo &c. R. Co., 49 N. Y. 204 (1872).

[150] Stinson v. New York Cent. R. Co. 32 N. Y. 333 (1865).

[151] Hawkins v. Great Western R. Co., 17 Mich. 57 (1868); Sisson v. Cleveland &c. R. Co., 14 Mich. 489 (1866).

[152] Baltimore &c. R. Co. v. McWhinney, 36 Ind. 436 (1871).

[153] Covington v. Willan, Gow. 115 (1819).

[154] Porter v. Southern Express Co., 4 S. C. 135 (1872).

gers of transportation by the means employed, which the reasonable and ordinary care of the common carrier might be insufficient to prevent, and the latter is liable only for those dangers which, with ordinary care and prudence, might be avoided.[155] He will still be answerable for his own negligence or misconduct, or that of his servants or agents.[156] A loss arising from embezzlement of the goods is not within the phrase.[157] In *Stewart v. London & North*

[155] French v. Buffalo &c. R. Co., 4 Keyes, 108, 2 Abb. App. Dec. 196 (1868).

[156] Alexander v. Greene, 7 Hill, 533 (1844); Moore v. Evans, 14 Barb. 524 (1852); Wells v. Steam Navigation Co., 8 N. Y. 375 (1853); Wallace v. Sanders, 42 Ga. 486 (1871); Nashville &c. R. Co. v. Jackson, 6 Heisk. 271 (1871); D'Arc v. London &c. R. Co. L. R. 9 C. P. 325 (1874.) The plaintiff's goods were carried by defendants under a contract with the government by which the baggage of certain troops, including the plaintiff's goods, were to remain in charge of a military guard, "the company accepting no responsibility:" *Held*, that the company were liable for the loss of the goods occasioned by their own negligence, and that the plaintiff could sue for the negligence though he could not have sued for the non-performance of the contract. Martin v. Great Indian R. Co., L. R. 3 Ex. 9 (1867.) Where a carrier transports goods at two rates, one lower than the other, and the receipt for the lower rate contains the words "at owner's risk," which term is explained therein as intended to free the carrier from any liability for loss except that caused by wilful misconduct, it will not be liable for damage to goods so sent, occasioned by the improper packing of the goods by the servants of the carrier. Lewis v. Great Western R. Co., 26 W. R. 14 (1877). "The contention put forward by Mr. Powell is this: There is evidence of something having been done which ought not to have been done: that is misconduct. That misconduct was not accidental, therefore it was wilful. But there is a mass of authority on this point; and it all goes to show that 'wilful misconduct' means some misconduct to which the will is a party, as opposed to accident or negligence. If a person does an act and knows that mischief will result from it, or if, knowing that mischief may or may not ensue, he does an act with indifference as to the result, that is wilful misconduct." Bramwell L. J., in Lewis v. Great Western R. Co., 26 W. R. 14 (1877).

[157] On arrival of a ship at London, the goods were refused admission, being prohibited by the laws of England, and as soon as it was discovered that they could not be landed, the consignees and master agreed that the goods should remain on board, and be returned to New York, "to the shippers at their risk," and an indorsement was made on the bill of lading to that effect. The return freight was a sum exceeding the freight from New York to London. *Held*, that the shipowner

Western Railway Company[158] a passenger on an excursion train received a ticket with a condition printed on the back declaring that baggage was to be "at passenger's risk." His baggage was lost through the negligence of the carrier. It was held that the case of baggage of a passenger was not within the provisions of the Railway Canal and Traffic Act, and that the company was not responsible for the loss. This case has, however, been recently overruled, and it is now held that a similar condition printed on a ticket is void under the Railway Canal and Traffic Act.[159] In the former case, Mr. *Brett*, of counsel for plaintiffs, cited from Story on Bailments[160] the following language: "The doctrine seems now firmly established both in England and America, that the responsibility of coach proprietors, carrying passengers with their baggage, stands as to their baggage upon the ordinary footing of common carriers." But all the judges expressed their dissent from the proposition. It may now, however, be regarded as stating the present rule of the law, both in this country and in England.

§ 188. "*On Lakes or Rivers.*"— A clause in a bill of lading that the carrier will not be responsible for loss or damage "on the lakes or rivers" means in the navigation of the lakes and rivers, and accordingly where a quantity of wheat was lost by the sinking of a wharf boat on which it was stored, awaiting the arrival of the packet on which it was to be shipped, the loss was held not to be within the exception.[161]

was responsible for the embezzlement of any part of the goods between the time of the first shipment at New York and their return there, though the custom house officers were on board during the time the vessel was in London, and might have embezzled the goods. Embezzlement was one of the risks the master assumed, and the stipulation in the agreement that the goods were to be at the shipper's risk could not have been designed to throw such a loss upon them. Schieffelin v. Harvey, 6 Johns., 170; *s. c.* at *nisi prius*, Anth. N. P. 56, (1810).

[158] 3 H. & C., 135 (1864).

[159] Cohen v. South Eastern R. Co., L. R, 2 Ex. D. 253 (1877).

[160] § 499.

[161] St. Louis &c. R. Co. v. Smuck, 49 Ind. 302 (1874).

§ 189. "*On the Train.*"— This phrase has received in one case an extended construction. A drover having received a "stock pass," allowing him to ride free with his cattle but providing that its acceptance should be considered a waiver of all claims for injury "received when on the above train," and intending to go with them, loaded them upon the train, and afterwards in passing the tender to the engine was struck upon the foot by a large stick of wood thrown from the tender by the engineer and seriously injured. The injury was held to be within the stipulation, and that it was not necessary that he should have been actually riding on the train at the time.[162] But in the same State it is held that the phrase "riding free" in a contract that "persons riding free to take charge of the stock do so at their own risk of personal injury" does not cover an injury to one while engaged in loading the stock, and who it did not appear was to take passage on the train.[163]

§ 190. "*Package.*"— See "Article."

§ 191. "*Perils of the Lake.*"—See "Dangers of Navigation."

§ 192. "*Perils of the River.*"— See "Dangers of Navigation."

§ 193. "*Perils of the Sea.*"— See "Dangers of Navigation."

§ 194. "*Perishable Property.*"— Mature merchantable corn is not within the exception of "perishable property."[164] "Perishable property in the commercial sense is that which from its nature decays in a short space of time without reference to the care it receives. Of that character are many varieties of fruits, some kinds of liquors, and numerous vegetable productions." But not goods which with reasonable care can be preserved for many years.[165]

[162] Poucher v. New York Cent. R. Co., 49 N. Y., 263 (1872). See also Gallin v. London &c. R. Co., L. R. 10 Q. B. 212, 2 Cent. L. J. 217 (1875) and *ante*, Cap. IV, § 96.

[163] Stinson v. New York Cent. R. Co., 32 N. Y. 333 (1865).

[164] Illinois &c. R. Co. v. McClellan, 54 Ill. 58 (1870).

[165] *Id.*

§ 195. "*Pilot, Master or Mariners.*" — A clause in a bill of lading exempting the owners from negligence or default of the "pilot, master or mariners," does not exempt them from liability for negligence of stevedores employed by them to unload the vessel.[166] Nor is the purser of a vessel within the terms "master or mariners."[167] In *Guillaume v. Hamburg &c. Packet Company*,[168] a carrier gave a bill of lading for goods which contained a stipulation absolving him from all responsibility for loss occasioned "by any act, neglect or default whatsoever, of the pilot, master or mariners." The goods arrived safely at their place of destination, but the carrier gave them to a carman who had not been authorized by the consignee to receive them. It was held that the loss was not within the exceptions.

§ 196. "*Place of Destination.*" — On the back of a receipt given by a railroad company for goods received for transportation was this condition: "The company will not hold itself liable, as common carriers, for articles of freight, after their arrival at their place of destination, and unloading at the company's warehouse or depots." The goods were received at West Springfield, Massachusetts, to be carried to Cleveland, Ohio, marked "T. B. C., Cleveland, Ohio," and also "care Western Transportation Co.," a corporation which was to receive them at the terminus of the railroad at East Albany. While at the warehouse of the railroad at East Albany and before the transportation company had received them, they were destroyed by fire, without fault of the railroad company. The latter was held liable. The "place of destination" was not the point on the carrier's route where he was to deliver the goods to another carrier, but was the ultimate destination — that point on the road of the first or connecting carrier at which the consignee was to receive the goods, according to the usual course

[166] Zung v. Howland, 5 Daly, 136 (1847).

[167] Spinette v. Atlas Steamship Co. 14 Hun. 100 (1878).

[168] 42 N. Y. 212 (1870), and see Gleadell v. Thomson, 56 N. Y. 194 (1874).

of business of the carrier.[169] By the printed conditions of a bill of lading, an express company contracted for exemption from all responsibility for the property shipped after its arrival at its "place of destination." The cotton was carried to its destination, and was there delivered to the wrong person. It was held that the company was liable.[170]

§ 197. "*Port of Discharge.* — The words "port of discharge" in a clause in a bill of lading requiring claims for loss or damage to be made to the agent of the carrier at the "port of discharge" refer to the port to which the goods, for a loss whereof a claim is made, were shipped.[171]

§ 198. "*Privilege of Re-Shipping.*"—The "privilege of re-shipping" is reserved in a bill of lading to allow the carrier to re-ship the goods in another boat, without rendering him responsible for the consequences of a deviation.[172] But it does not discharge the boat from any liability not excepted in the contract; and though the right is secured of transshipping on another boat, the liability continues until the goods are safely delivered at the port of destination, if under the like circumstances the carrier would be liable had the loss occurred on his own boat.[173] It is a privilege reserved to the boat and not an additional undertaking of the carrier.[174] It is not, therefore, a breach of his contract if,

[169] Ayers v. Western Co. 14 Blatchf. 9 (1876).

[170] Southern Ex. Co. v. Crook, 44 Ala. 468 (1870).

[171] Knell v. United States &c. Steamship Co. 33 N. Y. (S. C.) 423 (1871).

[172] But where a carrier receives goods to be conveyed with "privilege of re-shipping," and the goods are re-shipped on a boat which deviates from her route, the carrier is liable. Little v. Semple, 8 Mo. 99 (1843).

[173] Carr v. The Michigan, 27 Mo. 196 (1858); Little v. Semple, 8 Mo. 99 (1843). "It is but a privilege to the carrier in the execution of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of freight as he could earn, and to throw upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until their arrival at the destined port and delivery." McGregor v. Kilgore, 6 Ohio, 358 (1834); Whitesides v. Russell, 8 W. & S. 44 (1844); Dunseth v. Wade, 3 Ill. 285 (1840).

[174] Goods were shipped from New Orleans to Cincinnati, under bills of

by reason of low water, his boat is obstructed and he fails to deliver the goods which by re-shipping he might have delivered.[175] But the clause only gives power to transfer to another boat, and will not authorize a temporary storing of the goods on a wharf-boat at the point of re-shipment.[176] The additional expense of re-shipping is to be borne by the vessel on which the goods were first sent.[177]

§ 199. "*Quantity Guaranteed.*" — The words "quantity guaranteed," in a bill of lading of grain, mean that the bill of lading is conclusive evidence of the amount of grain to be delivered, and if it falls short the carrier will pay for the shortage. In *Bissel v. Campbell*,[178] it is said: "There has been considerable litigation in the courts growing out of the claims of consignees against carriers for shortage, and it must always be difficult to show whether the shortage was occasioned by the misconduct of the carrier or some mistake in the measurements. Hence, some years since, the clause was inserted in bills of lading upon the canals, that the consignee might make a deduction from the freight on account of shortage in substantially the form contained in the bill of lading in the case of *Meyer v. Peck*.[179] It seems to have been supposed that such a clause would make the carrier responsible for the quantity specified in his bill of lading, but the Court of Appeals held otherwise, and recently the words 'quantity guaranteed' have been inserted."

§ 200. "*Restraints of Princes.*" — An exception in a bill of lading of acts or restraints of princes and rulers, refers to the forcible interference of a State or the govern-

lading in the usual form, undertaking for their delivery, and containing the words "privilege of re-shipping." At the Ohio Falls the boat waited a month before there was water enough to carry her over. *Held* that it was competent to show by usage that under these words as used in a bill of lading, it was not the carrier's duty to re-ship instead of waiting for a rise. Broadwell v. Butler, 1 Newb. 171, 6 McLean, 296 (1854).

[175] Sturgess v. The Columbus, 23 Mo. 230 (1856).

[176] Carr v. The Michigan, 27 Mo. 196 (1858).

[177] Hatchett v. The Compromise, 12 La. Ann. 783 (1857).

[178] 54 N. Y. 353 (1873).

[179] 28 N. Y. 590 (1864).

ment of a country taking possession of the goods by strong hand, and does not extend to legal proceedings in the courts of a foreign country.[180]

§ 201. "*Robbers.*" — Robbery is distinguished from theft in containing the elements of force or fear. The word "robbers" in a bill of lading will not protect the carrier where the goods are stolen from him.[181] And "thieves" is restricted to thieves external to the ship, and will not exempt the carrier from liability for theft committed by one of the crew or a passenger,[182] or by the purser under whose charge the property is placed.[183] Where money is stolen from a carrier, under such a state of facts as will exonorate him from liability for the loss, the carrier will, nevertheless, be answerable for the money in *indebitatus assumpsit*, if he has recovered it from the thief.[184]

§ 202. "*Suffocation.*"— In an English case cattle were shipped under a bill of lading which contained the following exceptions: "Ship free in case of mortality, and from all damage arising from dangers of the sea. * * * The owner will not be liable for any loss arising from suffocation or other cause * * * the ship not liable for accident, injury, mortality or jettison, whether shipped on deck or in the hold." Several of the cattle being suffocated and killed from the vessel overturning, it having been sent to sea without proper ballast, the owner of the cattle was held entitled to recover notwithstanding the exception in the bill of lading.[185] A similar ruling was made in this country where the suffocation was due to a negligent delay.[186] These are but illustrations of the general rule that conditions

[180] Finlay v. Liverpool Steamship Co. 23 L. T. N. S. 251.

[181] DeRothschild v. Royal Mail Steam Packet Co. 7 Ex. 734, 21 L. T. Ex. 273 (1852).

[182] Taylor v. Liverpool &c. Steam Co. L. R. 9 Q. B. 546, 43 L. J. Q. B. 205, 22 W. R. 752, 30 L. T. (N. S.) 714 (1874).

[183] Spinette v. Atlas Steamship Co. 14 Hun. 100 (1878).

[184] St. John v. Express Co. 1 Woods, 612 (1871).

[185] Leuw v. Dudgeon, L. R. 3 C. P. 17, note (1867).

[186] Sturgeon v. St. Louis &c. R. Co., 65 Mo., 569 (1877).

limiting a carrier's liability do not embrace his negligence.

§ 203. "*Thieves.*" See "Robbers."

§ 204. "*Through without Transfer.*"—These words in a bill of lading are construed strictly; and a transfer of goods from a car to a warehouse for a temporary purpose is held to amount to a breach of the contract.[187]

§ 205. "*Tow and Assist Vessels.*"—The plaintiff shipped goods at Liverpool on board the Liberia, a steam vessel belonging to a steamship company, to be carried for freight, payable by the plaintiffs to the company, to Benin, on the coast of Africa, which goods, on the arrival of the Liberia at Bonny, were, in the usual course of the business of the company, and according to the terms of the bill of lading, trans-shipped on board the Kwara, a small branch steamer belonging to the company, to be forwarded thereby to their destination at Benin. The Kwara, with the plaintiff's goods

[187] Robinson v. Merchants Dispatch Trans. Co. 45 Iowa, 470 (1877); Stewart v. Merchants Dispatch Trans. Co., 47 Iowa, 229 (1877). Seevers J. dissented from the opinion of the court in the former case, saying: "The opinion holds as a matter of law that the unloading the goods at Chicago and placing them in a warehouse constitutes a breach of the contract. What is meant by 'through without transfer?' To transfer, according to Webster, means to remove from one place to another. Evidently this was not the meaning contemplated by the parties; if so, the goods never could have left the State of Massachusetts. It is well known and understood there are several distinct railroads between Worcester, Massachusetts and Cedar Rapids, Iowa, over which the goods had to pass, and it is the transfer from the terminus of one road or depot to another that is referred to. In some places this transfer is made with wagons or drays. In others, by means of switches or side tracks, cars loaded with goods are transferred from one road to another. Can it be said as a matter of law the goods in question could not, without a breach of the contract, be unloaded and placed temporarily in a warehouse, and then reloaded in cars owned by the defendant and transferred from one road to another. If the caption be a part of the contract it must have a reasonable construction, and therefore it cannot be said to prohibit a transfer from one car to another. It may be that among shippers the word 'transfer,' through usage or custom, has acquired a meaning which will warrant the construction placed thereon by the majority of the court. If so, such custom should have been averred and proved. But I strenuously object that the law attaches any such meaning thereto."

on board, left Bonny and proceeded on her voyage to Benin, calling on her way at Brass, where she had both to discharge and take in cargo. Whilst lying in the harbor at Brass, and after having discharged and taken in cargo, and within two or three hours of being ready to proceed on her onward voyage to Benin, the Kwara was taken by her captain at the request of the captain and owners of another vessel, to the mouth of the Brass river, some three miles from the harbor, for the purpose of towing such other vessel which had got stranded on the breakers in attempting to cross the bar at the entrance of the river, and in her efforts to tow that vessel off, the Kwara herself, in consequence of her screw getting fouled with a rope, was wrecked, and the plaintiff's goods were lost. It did not appear that human life was in any imminent danger, or that the assistance of the Kwara was sought for except to save property. The bill of lading given by the company on receiving the goods at Liverpool, contained a clause giving to their vessels "liberty to tow and assist vessels in all situations," and also a memorandum in the margin as follows: "The within goods to be transported at Bonny, and forwarded to destination by branch steamer at ship's expense but shipper's risk." In the action by the plaintiffs to recover the value of their goods, it was held that under the express words of the clause in the bill of lading giving liberty "to tow and assist vessels, etc.," the Kwara was justified and protected in going to the assistance of the other vessel in the manner and under the circumstances stated.[188]

§ 206. "*Unavoidable Accidents.*"—See also "Dangers of Navigation."—The distinction between "unavoidable" or "inevitable" accidents[189] and the act of God is best expressed by McCAY, J., in *Central Line v. Lowe:*[190] "The latter covers only natural accidents, such as lightning,

[188] Stuart v. British &c. Steam Nav. Co., 32 L. T. (N. S.) 257.

[189] The terms "unavoidable accidents" and "inevitable accidents" are synonymous. Fowler v. Davenport, 21 Tex. 626 (1858).

[190] 50 Ga. 509 (1873).

tempests, earthquakes and the like, and not accidents arising from the negligence or *act of man*. To make out the case of an exemption for a carrier against either the act of God or unavoidable accident there must be a *vis major;* the interfering cause must be irresistible." In this case a common carrier undertook to carry cotton under a special contract, in which it was stipulated that he was not to be liable for "unavoidable accidents." One of the bags of cotton was lost by falling into the river, in consequence of the breaking of the "hog chain," an iron rod against which the cotton was piled on the deck of the boat. In a suit brought for the loss, the defendant proved that the rod had been lately examined, and that it appeared sound; that it had previously borne heavier weights, and that it broke in consequence of a hidden flaw. The defendant was held liable. "It seems absurd to say" said the court, "that it was not possible to have avoided the breaking of this chain or rod. It ought to have been made stronger; it ought to have been tested. The case is one of simple failure to have a good vessel. This was doubtless an accident, and were that the only word used in the agreement the carrier would be excused; but the words are far stronger than this." As has been seen in the introductory chapter,[191] this phrase has received in some cases a very different interpretation. Thus it has been held in Indiana that the exception of "unavoidable dangers" was included in the act of God and did not, therefore, affect the liability of the carrier at common law.[192] In *Crosby v. Fitch*[193] it was said that the "act of God, inevitable accident and dangers of the sea" were words of similar import which would excuse a loss whether contained in a bill of lading or not; and the same doctrine has been held in two cases in the Admiralty courts.[194] Similar

[191] *Ante* Cap. 1, § 5.
[192] Walpole v. Bridges, 5 Blackf. 222 (1839).
[193] 12 Conn. 410 (1838).
[194] The Casco. Dav. 184 (1844); The New Jersey, Olcott, 444 (1846).

views which have been expressed in Pennsylvania and Georgia,[195] have little authority, in the first case the opinion being a mere *dictum*, as the loss was by an extraordinary flood, and was therefore within the act of God, while in the second the decision is overruled by *Central Line v. Lowe* just referred to.[196]

§ 207. "*Value and Contents Unknown.*"—These words in a bill of lading exclude the inference of any admission by the carrier as to the quantity or quality of the contents of the package at the time of delivery, beyond what is visible to the eye or apparent from handling it—nothing is implied but the receipt of the property in good order externally, and the carrier may show by parol that the value and contents were below the estimate placed upon them by the shipper.[197] The carrier has complied, *prima facie*, with his contract when he has delivered the box or case or other article, externally in good condition. The burden of proof is then upon the shipper to show that the contents were in good order and condition when shipped.[198] On the other hand a receipt, for example, for "boxes of raisins" would imply the receipt of boxes filled with raisins.[199] But the effect of these words may sometimes result to the benefit of the shipper. In *Fassett v. Ruark*[200] a bill of lading was given for certain cases of goods described as "domestics" with particular marks and numbers, the words "contents unknown" being written before the signature. One of the cases not being delivered, the shipper was permitted to show that the case contained goods of a much higher value, and to recover their cost. It should be added, however, that

[195] Morrison v. Davis, 20 Pa. St. 171 (1852); Fish v. Chapman, 2 Ga. 349 (1847).

[196] This question is considered at more length in Cap. 1, §§ 5, 6, of this treatise.

[197] The California, 2 Sawy, 12 (1871); The Colombo, 3 Blatchf. 521 (1856); Clark v. Barnwell, 12 How. 272 (1851); see *ante*, "Good Order and Condition."

[198] Wentworth v. The Realm, 16 La. Ann. 18 (1861).

[199] The Bellona, 4 Ben. 503 (1871).

[200] 3 La. Ann. 694 (1848).

the evidence showed that the misdescription was not made for the purpose of imposing on the carrier, and that no higher frieght would have been charged had the real contents been known. "We think," said the court, "the descriptive terms used in this bill of lading are not conclusive upon the parties. The object of the instrument was to embody the written acknowledgment of the receipt of a certain number of packages of merchandise, and the agreement to transport and deliver them to the party named. It was not essential that the contents of the packages should be stated; and the master must be considered as expressly declining to be bound as to the contents by inserting at the foot of the bill of lading 'contents unknown.' The packages were not opened so that he could examine them; and his undertaking was to deliver so many packages of certain marks and numbers. Having failed to do this, he must answer for the value of the missing package according to its actual contents. The rights of the parties should in this respect be reciprocal. Suppose the captain had been able to prove that the missing case contained articles of much less value than those denominated 'domestics' it is very clear that having signed 'contents unknown' he would have been allowed to offer such proof, and on establishing the fact, could not have been held as for the value of a case of domestics." In a more recent English case plaintiffs delivered to the defendants, to be carried on their vessel, a package described by mistake in the bill of lading tendered to the captain, as "linen goods," but before signing the captain stamped on the bill of lading the words "weight, value and contents unknown." The package contained silk, and two pieces were found to have been abstracted on the arrival of the ship. Freight was paid as for linen goods, being at a less rate than that required for silk. The court held that under the bill of lading stamped and signed as above, the defendants contracted to carry the package, whatever its contents, and that they were liable for the loss.[201]

[201] Lebeau v. General Steam Nav. Co., L. R. 8. C. P. 88 (1872).

§ 208. "*Viciousness.*"—A railroad company undertook to carry cattle, with an agreement for exemption from loss or damage for any injury caused by the "viciousness" of the animals. It was held that if the cars in which the cattle were placed were defective, the carrier would be responsible for any injury done to the cattle, even though the viciousness of the cattle might have contributed to the injury.[202]

§ 209. "*Watered and Fed.*"—A condition in a contract for the transportation of live stock that the stock is to be "watered and fed by the owner and at his risk" while on the cars, refers only to the ordinary sustenance the animals may require in the course of transportation. The throwing of water upon the cattle for the purpose of cooling them, and which in hot weather is often absolutely essential to save them from dying of the excessive heat, is not within this exception; this duty still, for reasons of public convenience, devolves upon the carrier.[203]

§ 210. "*Weather, Injuries Occasioned by the.*"—An exemption from "injury to any article of freight during the course of transportation, occasioned by the weather" will not include negligence, as where a railroad company in transporting fruit in cold weather used a common box car when they should have used a refrigerator car.[204]

§ 211. *Conflict of Laws.*—The rule that contracts are in general to be construed according to the law of the place where they are made applies to the contracts of common carriers. Thus the liability of a carrier who undertakes in Mexico to convey goods into Texas is to be governed by the laws of Mexico.[205] In an English case, S. took a ticket in England from a steam packet company for the conveyance of himself, family and baggage from Southampton to Alexandria, and from Suez to Mauritius. The ticket was issued subject to a condition, signed by S., that the com-

[202] Rhodes v. Louisville R. Co., 9 Bush, 688 (1873).
[203] Illinois Cent. R. Co. v. Adams, 42 Ill. 474 (1867).
[204] Merchants Dispatch &c. Co. v. Cornforth, 3 Col. 280 (1877).
[205] Cantu v. Bennett, 39 Tex. 303 (1873).

pany would not hold themselves liable for damage to, or detention of, passengers' baggage. In the course of the journey some articles for personal use were lost. It was held that the contract was to be construed by the law of England, and that as at common law it is open to carriers to limit their common law liability by special contract with the consignors of goods, the loss of S. fell within the stipulated condition.[206] The same principle governs contracts of carriage between the different States;[207] a contract made, for example, in New York to carry goods to Boston is governed by the law of New York.[208] It will be presumed that the contract of a railroad company of another State is not *ultra vires*.[209]

In a New Hampshire case it was ruled that where a contract is made by a common carrier in one State to transport goods from that State into another, and the goods are lost, the rights of the parties are governed by the law of the State in which the loss happens.[210] But in a late case in the same State where a common carrier undertook to transport goods from a point in the State of Vermont to a point in

[206] Peninsular &c. Steam Nav. Co. v. Shand, 11 Jur. (N. S.) 771; 13 W. R. 1049; 12 L. T., (N. S.) 808, P. C.

[207] Pennsylvania Co. v. Fairchild, 99 Ill. 260 (1873).

[208] A steamboat was in the business of transporting goods from New York to Providence. The plaintiff owned carriages, which he wished to have transported to Boston. The carriers received them in New York, to convey them to Providence or Boston, and they were lost in the Sound near Huntington, L. I. *Held*, that the contract of the parties was to be governed by the laws of New York. Hale v. N. J. Steam Nav. Co., 15 Conn. 539 (1843). A bill of lading executed in Ohio, of merchandise there shipped to be transported to a place in New York, which bill is delivered, in pursuance of a contract made in and by residents of Ohio, to one there making advances upon the faith thereof, and to secure drafts drawn for such advances upon parties in New York, is an Ohio contract, and is to be construed by and under the laws and commercial usages of that State. First Nat. Bank v. Shaw, 61 N. Y. 283 (1874).

[209] Maghee v. Camden &c. R. Co. 45 N. Y. 514 (1871).

[210] Gray v. Jackson, 51 N. H. 9 (1871). Goods were shipped in Ohio, but were lost in transit in New York. It was held that as to the loss the case was governed by the law of the latter State. Barter v. Wheeler, 49 N. H. 9 (1869).

the State of New Hampshire, it was said by the Supreme Court of the latter State that so far as the contract was to be performed in Vermont, it would seem to be governed by the law of that State.[211] In *Hoadley v. Northern Transportation Company*[212] the jury found that by the law of Illinois where the goods were shipped, the mere receipt without objection of a bill of lading which limits the carrier's liabilities for loss by fire would not raise a presumption that its terms were assented to. In Massachusetts, where the cause was tried, the law is that a bill of lading or shipping receipt, taken by a consignor without dissent at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability, will exempt the carrier when the loss is not caused by his own negligence. The court held that the rule of law laid down in Illinois affected the remedy only, and that the law of the forum as to the implied assent of the shipper to conditions of lading must prevail. In a Pennsylvania case plaintiff purchased from defendant, a New Jersey corporation, at its office in Pennsylvania, a ticket from Philadelphia to a place in New Jersey, for which he had his trunk checked. The trunk was lost. It was held that as the contract was to be performed in New Jersey by a New Jersey corporation, it was to be governed by the laws of that State, and that an act of the Pennsylvania legislature, limiting the liability of railroad companies for loss of baggage, did not apply.[213]

A contract for carriage which is valid in the State where it is entered into by the consignor, will bind a consignee resident in another State.[214] In an Iowa case a bill of lading, stipulating for exemption of the carrier from liability for losses by fire, was drawn in Connecticut, where such exemption is lawful, and whence the merchandise was to be shipped to Iowa, in which State carriers are not permitted

[211] Rixford v. Smith, 52 N. H. 355 (1872).
[212] 115 Mass. 304 (1874).
[213] Brown v. Camden &c. R. Co., 83 Pa. St. 316 (1877).
[214] Robinson v. Merchants Dispatch Trans. Co., 45 Iowa, 470 (1877).

to limit their liability. The goods were transported to Chicago, Ill., where they were destroyed without fault of the carrier. In an action brought against the latter by the consignee to recover their value, it was held that the contract was valid, and that the plaintiff could not recover.[215] Although where a contract is made in one State, and suit is brought in another State, the validity of the contract will be determined by the law of the State where it is made, yet it has been held that an agreement exempting a carrier from liability for negligence, made in New York and to be executed there, but invalid by the common law of Ohio, can not, in the latter State, be converted into a cause of action merely by the fact that the parties have subsequently come within the jurisdiction.[216]

[215] Talbott v. Merchants &c. Trans. Co., 41 Iowa, 247 (1875), and see McDaniel v. Chicago &c. R. Co., 24 Iowa, 412 (1868).

[216] Knowlton v. Erie R. Co., 19 Ohio St. 260 (1869).

CHAPTER IX.

THE QUESTION OF CONSIDERATION AS AFFECTING CONTRACTS LIMITING LIABILITY.

SECTION.

212. A Consideration Necessary to Support the Contract.
213. What Consideration Sufficient.
214. Carriers of Passengers — Limiting Liability for Negligence.
215. Duty of Carrier to Passenger Riding Free.
216. Power to Evade Liability in Such Case.
217. What is a Gratuitous Passenger.
218. The Case of a Free Pass — The American Doctrine.
219. The Doctrine in Louisiana and New Jersey.
220. The Doctrine in New York.
221. Presumption From Possession of Free Pass.
222. Criminal Liability.

§ 212. *A Consideration Necessary to Support the Contract.* — It is a rule of law, too radical to need any citation of authority in this place, that a contract to be binding requires a consideration to support it. It has been seen that a common carrier is bound by law to bear the extraordinary risks attached to his calling, for all who may choose to employ him, upon the terms of paying him his reasonable compensation therefor. He can not refuse to receive and transport goods offered to him because the shipper will not assent to their being carried under a special contract limiting his common law responsibility, and if he should do so, he would render himself liable to an action.[1] Now, the performance

[1] *Ante*, Cap. III, § 69; Mercantile Mut. Ins. Co. v. Chase, 1 E. D

of an act which a party is under a legal obligation to perform does not constitute a good consideration for a promise.[2] It follows from this that as a common carrier is bound to carry when requested, the mere agreement to carry does not furnish a consideration for a contract in derogation of his responsibility at common law, nor does his agreement to carry for the price which he might charge in case his liability was not limited or which it was his custom to charge in such case. It has sometimes been said[3] that this is a matter with which the courts can no longer deal; but this opinion is erroneous, as the adjudications cited below will demonstrate.[4] As said by the New York Court of Appeals in speaking of a railroad ticket which exempted the company from liability in certain circumstances: "Like all contracts to render such a one valid it is indispensable that it have some consideration, which it would not have if the passenger paid the full fare fixed by law. That is all which the company is allowed to receive for the service and the risk united, and it can no more demand the full compensation of both, for the service alone, than it could demand the fare for a hundred miles for carrying a passenger fifty miles. If the service is reduced, the amount of reward must be reduced in proportion; and if the company is relieved from the risk,

Smith, 115 (1859); Kirby v. Adams Express Co., 2 Mo. (App.) 369, 3 Cent. L. J. 435 (1876). In Southern Express Co. v. Moon, 39 Miss. 822 (1863), it is said: "Consignors have only to insist on a simple receipt for their goods, offering to pay reasonable compensation, and steadily refusing the artfully prepared receipts limiting the carrier's liability and depriving the consignor of his legal rights, to restore in practice the security and safety which the law affords. They will, in this manner, avoid the losses which scheming corporations, under the guise of special agreements, are daily inflicting upon them." But this remedy, though open to the public, is practically useless. See *ante*, Cap. III, § 69.

[2] Addison on Contracts, § 4.

[3] As in Kirby v. Adams Express Co., 2 Mo. (App.) 369, 3 Cent. L. J. 435 (1876).

[4] Nelson v. Hudson River R. Co., 48 N. Y. 498 (1872); Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862); German v. Chicago &c. R. Co., 38 Iowa, 127 (1874); Farnham v. Camden &c. R. Co., 55 Pa. St. 53 (1867); McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867).

it must make compensation for that relief by the reduction of fare or otherwise." [5] A case of interest upon the consideration required in agreements between shippers and carriers is that of *German v. Chicago Railroad Company*,[6] decided by the Supreme Court of Iowa, in 1874. There a contract for the shipment of cattle stipulated that the owner should assume all risk of injury done by the cattle to each other, and that the owner should be permitted to go on the train in charge of them. The railroad company filled four cars with a part of the cattle, and sent them off without notice to him. The owner then signed the contract above mentioned, not knowing that any of the cattle had been shipped. It was held that the consideration for the agreement was that the owner should be allowed to go on the train with all the cattle, filling twelve cars in all, and that as the owner had been deprived of an opportunity to go with the cattle first sent off, there was no consideration for the agreement as to them, and that the company was not released from any liability as to the cattle first shipped by reason of anything contained in the agreement.

§ 213. *What Consideration Sufficient.*— It has been decided, however, that a reduced compensation is a sufficient consideration to support a contract for a limited liability,[7] and the same is true of a free pass.[8] Where the bill of lading limited the liability of the carrier to a certain sum in case the goods were lost, and contained the words "the shipper declining to pay for any higher risk," it was held that these words showed a consideration for the reduced risk.[9] So the words "tariff rates" in the bill of lading have been construed to mean a less rate than the carrier might have charged, and so to uphold the special contract.[10] It is

[5] Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862).

[6] 38 Iowa, 127.

[7] Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862); Nelson v. Hudson River R. Co., 48 N. Y. 498 (1872).

[8] Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862).

[9] Farnham v. Camden &c. R. Co., 55 Pa. St. 53 (1867).

[10] Nelson v. Hudson River R. Co., 48 N. Y. 498 (1872).

held by the Supreme Court of the United States that when a bill of lading contains restrictions on the liability of the carrier the court will not presume in the absence of testimony that it was not done upon proper and sufficient consideration.[11] And a similar ruling has been made in Michigan.[12]

§ 214. *Carriers of Passengers — Limiting Liability for Negligence.*— Following the American doctrine as stated in a former place,[13] a carrier of a passenger who has paid a consideration for his passage can not exempt himself from liability for damages caused by his own negligence or that of his servants, by any contract which he may have induced his customer to approve.[14] Such a contract is void as against the policy of the law. In England, on the other hand, an agreement of this character is valid, and will bar an action for an injury occasioned by the negligence of the servants of the carrier. The question of public policy so much relied upon by our judges is but little noticed by the English courts in this class of cases. Such an agreement is there looked upon as very similar to the contract between master and servant, in which the servant undertakes all the ordinary risks of the service, including risks of being injured by the negligence of other servants in the same employment.[15] No trace of such an argument is to be found in the American reports, although the conclusion to which it leads is accepted in New York.[16]

§ 215. *Duty of Carrier to Passengers Riding Free.*— It has become well established in this country as a rule of public policy that common carriers must exercise the same degree of care in carrying persons free as in carrying them for hire.[17] In the leading case upon this point in the Su-

[11] York Co. v. Central Railroad, 3 Wall. 107 (1865).
[12] McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867).
[13] *Ante*, Cap. II, § 28.
[14] Id.; Ohio &c. R. Co, v. Selby, 47 Ind. 471 (1874).
[15] Hall v. North Eastern R. Co., L. R. 10 Q. B. 437 (1875).
[16] *Ante*, Cap. II, § 55, and see *post*, § 220.
[17] Flint &c. R. Co., v. Weir, 37 Mich. 111 (1877); See Williams v. Tay-

preme Court of the United States, the plaintiff was a stockholder in the defendants' railroad company and was the president of another railroad company. He was on the road of the defendants by invitation of the president of the company, in a small locomotive car used for the convenience of the officers of the company, and paid no fare. He was injured by collision of this car with an engine whose driver was acting in disobedience of orders that had been given him to keep the track clear. The court below instructed the jury that if the plaintiff was injured through the gross negligence of one of the servants of the defendants then and there employed on the road he was entitled to recover. The Supreme Court held this instruction to be correct, GRIER, J., saying: "This duty [that of a carrier] does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. It is true a distinction has been taken in some cases between simple negligence and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition) as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless

lor, 4 Port. 234 (1836); Fay v. The New World, 1 Cal. 348 (1850); Gordon v. Grand Street R. Co., 40 Barb. 546 (1863); Indiana R. Co. v. Mundy, 21 Ind. 48 (1863); Ohio &c. R. Co. v. Muhling, 30 Ill. 9 (1861); Illinois Cent. R. Co. v. Read, 37 Id. 484 (1865); Perkins v. New York Cent. R. Co., 24 N. Y. 196 (1862); Flinn v. Philadelphia &c. R. Co., 1 Houst. 469 (1857).

agents. Any negligence in such cases may well deserve the epithet of 'gross.'" [18]

§ 216. *Power to Evade Liability in Such Case.*— But though the duty of the carrier towards passengers paying fare and those traveling free is the same, it has been much debated whether in the latter case the carrier should not be permitted to throw upon the passenger all the risks of the journey, in consideration of the gratuitous service rendered by him. In England and Ireland such a contract is valid, for the reason that there a free passenger, independent of any contract, is a mere licensee to whom the carrier owes no duty.[19]

§ 217. *What is a Gratuitous Passenger.* — The distinction upon which this discussion is founded renders the question as to who is to be considered as a free passenger an important one, and one sometimes disregarded.[20] Any consideration moving to the carrier would seem to change the relation. A person who receives a free pass as part of a

[18] Philadelphia &c. R. Co. v. Derby, 14 How. 468 (1852). This doctrine was re-affirmed in The New World v. King, 16 How. 469 (1853). But see Boyce v. Anderson, 2 Pet. 150 (1829), where it is said that the carrier of a slave without reward would be liable only for gross negligence.

[19] Duff v. Great Western R. Co., 13 Ir. L. T. 100 (1878); Neville v. Cork &c. R. Co., 9 Ir. L. T. 69, 2 Cent. L. J. 366 (1875). In Hall v. North Eastern R. Co., L. R. 10 Q. B. 437 (1875), the plaintiff was traveling on a drover's ticket, which had printed on it certain conditions exempting the railway company from liability for the safety of the plaintiff while on his journey. The form of these conditions was such as if it was intended that the holder of the ticket should sign the conditions. The plaintiff did not sign the conditions, but traveled on the railroad with his live stock without paying any fare. The court held that the plaintiff was bound by the conditions printed on the ticket the same as if he had signed them. Blackburn, J., said: "It is true the plaintiff did not sign the ticket, and he was not asked to do so; but he traveled without paying any fare, and he must be taken to be in the same position as if he had signed it."

[20] In an Indiana case the plaintiff was spoken of as a free passenger, the fact being overlooked that he had paid freight to the company for goods which he had in charge. Indiana Cent. R. Co. v. Mundy, 21 Ind. 48 (1863). See, also, Higgins v. New Orleans &c. R. Co., 28 La. Ann. 133 (1876).

contract beneficial to the carrier, as for example a drover who receives a pass to travel with stock on which he pays freight, is not merely a gratuitous passenger,[21] and this even though his ticket may have the words "free pass" printed upon it.[22] The price which he pays for the transportation of his cattle and the care which he takes of them on the journey are a sufficient consideration for his own passage. A contract of this kind is analogous to those in *Pierce v. Milwaukee & St. Paul Railway Company*,[23] where corn was shipped by a railway company which agreed to return the empty bags free, and *Harrington v. McShane*,[24] where a carrier undertook to transport goods and sell them, and bring the money arising from the sale back with him without charge. In these cases it was held that neither the carriage of the empty bags nor the return of the money could be considered as gratuitous. In a late case in the Supreme Court of the United States,[25] the plaintiff, who resided at Portland, Me., being interested in a car coupling which had been in use upon the cars of the defendant company, was requested by its officers to meet them at Montreal to arrange about its future use, they agreeing to pay his expenses. In pursuance of the arrangement he was furnished with a pass which purported to be a "free ticket," and which exempted the company from liability for the negligence of its servants.[26] During the passage from

[21] Ohio &c. R. Co. v. Selby, 47 Ind. 471 (1874); Cleveland &c. R. Co. v. Curran, 19 Ohio St. 1 (1869); Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315 (1865); Smith v. New York Cent. R. Co., 29 Barb. 132 (1859), affirmed by a divided court, 24 N. Y. 222 (1862); Indianapolis &c. R. Co. v. Beaver, 41 Ind. 493 (1873). But see Bissell v. New York Cent. R. Co., 25 N. Y. 442 (1862); Railroad Co. v. Lockwood, 17 Wall. 357 (1873).

[22] Cleveland &c. R. Co. v. Curran, 19 Ohio St. 1 (1869).

[23] 23 Wis. 387 (1868).

[24] 4 Watts, 443 (1834).

[25] Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 6 Cent. L. J. 207 (1877).

[26] On the face of the pass were these words: "Pass Mr. Stevens from Portland to Montreal," and it was signed by the proper officer. On the back was the following printed indorsement: "The person accepting

Portland to Montreal the train was thrown from the track and the plaintiff was injured. The Supreme Court of the United States held that he was not, under these circumstances, a gratuitous passenger, Mr. Justice BRADLEY saying: "The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transaction. The pass was a mere ticket or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood.[27] There the pass was what is called a 'drover's pass,' and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was traveling upon the conditions indorsed on the pass; or that, if he traveled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge that if the plaintiff was a free or gratuitous passenger, the defendant was not liable. The evidence did not

this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

[27] Railroad Co. v. Lockwood, 17 Wall. 357 (1873).

sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken. * * It is strongly urged, however, that the plaintiff, by accepting the free pass indorsed as it was, was estopped from showing that he was not to take his passage upon the terms therein expressed; or at least that his acceptance of the pass should be regarded as competent if not conclusive evidence that such a pass was in the contemplation of the parties when the arrangement for his going to Montreal was made. But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. This is a sufficient answer to the argument propounded. The defendant being, by the very nature of the transaction, a common carrier for hire, can not set up, as against the plaintiff who was a passenger for hire, any such estoppel or agreement as that which is insisted on."

§ 218.—*The Case of a Free Pass—The American Doctrine.*—According to the American doctrine, then, a condition in a "stock pass" declaring a common carrier exempt from liability for negligence, is against the policy of the law and is void.[28] But the question of consideration is not material, and, therefore, it follows that according to the weight of authority in this country, a traveler on a free pass, though he expressly agree that the carrier shall not be liable

[28] Cleveland &c. R. Co. v. Curran, 19 Ohio St. 1 (1869); Cincinnati &c. R. Co. v. Pontius, Id. 221 (1869); Knowlton v. Erie R. Co. Id. 260 (1869); Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315 (1865); Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526 (1854); Goldey v. Pennsylvania R. Co. 30 Pa. St. 242 (1858); Flinn v. Philadelphia &c. R. Co., 1 Houst. 469 (1857); Railroad Company v. Lockwood, 17 Wall. 357 (1873).

for any injury he may sustain, will still be liable for such an injury the result of the negligence of his servants or agents. This has been expressly decided in Alabama,[29] Illinois,[30] Indiana,[31] Iowa,[32] Minnesota,[33] and Pennsylvania.[34] In the Minnesota case, *Jacobus v. St. Paul & Chicago Railroad Company*,[35] the reasons for this rule are well stated by the court. "There are two distinct considerations," says BERRY, J., "upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the State. The latter is a consideration of public policy growing out of the interest which the State or Government, as *parens patriæ*, has in protecting the lives and limbs of its subjects. So far as the consideration of public policy is concerned, it can not be over-ridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can then be permitted to stand. Whether the case be one of a passenger for hire; a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the State in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why

[29] Mobile &c. R. Co. v. Hopkins, 41 Ala. 486 (1868).
[30] Illinois Cent. R. Co. v. Read, 37 Ill. 484 (1865).
[31] Ohio &c. R. Co. v. Selby, 47 Ind. 471 (1874).
[32] Rose v. Des Moines Valley R. Co., 39 Iowa, 246 (1874).
[33] Jacobus v. St. Paul &c. R. Co., 20 Minn. 125, 1 Cent. L. J. 375 (1873).
[34] Pennsylvania R. Co. v. Butler, 57 Pa. St. 335 (1868).
[35] *Supra.*

these propositions are not equally applicable to passengers of either of the kinds above mentioned. It is said, however, that it is unreasonable to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers, because there may be a few on board for whom they are not responsible. In the first place, if this consideration were allowed to prevail, it would prove too much; for it could be urged with equal force and propriety in the case of a merely gratuitous passenger as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire. Again, suppose (what is not at all impossible or improbable, as, for instance, in case of a free excursion,) that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility the greater the care; and that *any* relaxation of responsibility is dangerous. Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibilty, or upon the existence of an abstract rule of imposing stringent obligations upon him. It is the enforcement of the rule and of the liability imposed thereby—the mulcting of the carrier for his negligence—which brings home to him in the most practical, forcible, and effectual way, the necessity for strictly fulfilling his obligations. It may be that on a given occasion, the gratuitous passenger or the passenger upon a free pass is the only person injured, as for aught that appears was the fact in this instance, or the only party who will pro-

ceed against the carrier—the only person who will practically enforce upon the carrier the importance of a faithful discharge of his duty. These considerations, as it seems to us, ought to be decisive upon the point that sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed, though the passenger be gratuitous, or as in this case, riding upon a conditioned free pass." The question of the power of a common carrier to absolve himself from the consequences of his negligence towards a free passenger, has not as yet been directly presented to the Supreme Court of the United States. *Railroad Company v. Lockwood*,[36] was a case of a stock pass, and in *Grand Trunk Railway Company v. Stevens*,[37] although the ticket purported to be a "free ticket" a consideration was shown. But in the latter case, Mr. Justice BRADLEY said: "We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence: 'May not men make their own contracts, or in other words, may not a man do what he will with his own?' The question at first sight seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled." It may be said, however, that the opinions of Mr. Justice BRADLEY, who delivered the judgment of the court in the *Lockwood* and *Stevens*' cases, leave little room for conjecture as to what the decision of that tribunal would be in a case of this kind.

[36] 17 Wall. 357 (1873).
[37] 95 U. S. 655, 6 Cent. L. J. 207 (1876).

No court in the land exhibits a more determined endeavor to protect the public in their dealings with common carriers than the Supreme Court of the United States.[38]

§ 219. *The Doctrine in Louisiana and New Jersey.*—In New Jersey, in a case which was considered first by the Supreme Court and next by the Court of Appeals, it was held without dissent in either court that a contract that in consideration of a free passage a passenger will assume the risk of injuries to his person from the negligence of the servants of a railroad company, is valid in law.[39] In *Higgins v. New Orleans Railroad Company*,[40] a news-vendor had the privilege from the company of selling books and papers on its trains by his agents, on condition that such agents as went on the trains should sign a contract exempting the company from all liability for injuries which they might receive. There was no consideration paid for the privilege; but his agents rendered small services to passengers. The plaintiff, an agent who had signed the agreement, was injured while riding on a train under this contract. It was held that the injury not being occasioned by the "fraudulent, wilful or reckless conduct" of the defendant, he could not recover.

§ 220. *The Doctrine in New York.*—The first case in New York, *Welles v. New York Central Railroad Company*,[41] arose in 1858. The plaintiff received a free ticket from the defendants permitting him to ride on their cars at his own pleasure. On the back of the ticket was the following indorsement: "The person accepting this free ticket assumes all risk of accidents and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to

[38] See *ante*, Cap. II § 29.

[39] Kinney v. Central R. Co. 32 N. J., (Law) 407 (1868); 34 N. J. (Law) 513 (1869).

[40] 28 La. Ann. 133 (1876).

[41] 26 Barb. 641.

the property of the passenger using this ticket." No consideration for the carriage was shown. By a collision between the passenger train in which he was riding and a freight train negligently left standing on the track, the holder of the ticket was injured. A verdict for $750 having been found in his favor the case was taken to the Supreme Court. There the judgment was reversed, that court holding that the contract was not unlawful. SMITH J. said: "In the conclusion of the judge of the circuit, that the plaintiff is entitled to recover in this action, I find myself unable to concur. The plaintiff received a free ticket from the defendants, entitling or permitting him to ride in their cars at his own pleasure, with an indorsement on his ticket by which 'he expressly agreed that the company should not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person or for any loss or injury to his property.' These were the terms and the conditions on which the defendants gave and the plaintiff received his ticket. It implies in effect, an agreement on the part of the plaintiff to take the risk of all the casualties attending railroad travel, so far as they arose or might arise or result from negligence on the part of the officers and agents of the defendants. The defendants are a corporation, engaged in carrying persons and property as common carriers. They are necessarily obliged to carry on their business through the instrumentality of numerous officers and other agents. From the character of the business, the great liability to accidents or injuries to person and property resulting more or less in most cases from some degree of neglect or want of care on the part of some of their numerous employees, and the serious character of such injuries, the company might well desire to restrict their liability to damages from such casualties to the narrowest possible limit. In respect to persons carried for hire, they could obviously do nothing to restrict their liability or that should excuse them from the exercise of the utmost diligence and care. But they

are not obliged to carry any person without compensation, at their own risk. They must have the clear right to contract with any such person that he must take his own risk. He would ride in the same cars with other passengers, and would be liable to the same and no greater accidents, but as he would pay nothing for his fare he might well agree to take his own risk. He knew that the company was liable to suffer great loss and damage from the negligence of its agents, and that it would naturally seek to avoid or had a great interest in preventing such loss by every reasonable precaution. But with the best of care and the utmost caution, some accidents, he knew, would unavoidably occur from the unforseen negligence, carelessness or want of skill of its employees. Against all such accidents, 'under any circumstances, whether of negligence by the agents of the defendants or otherwise, the plaintiff expressly agreed to assume and take his own risk.' This is the bargain. It is not unlawful. It is distinctly and fairly made and clearly understood. I can not see why it is not fully binding, to the extent of exempting the defendants from all loss or liability to loss or damage from injuries resulting from mere negligence. I do not see any ground to stop short of this exemption from loss or liability on the part of the defendants, within the entire range or scope of negligence not arising from bad faith or fraud. I see no ground to measure the degrees of negligence. The contract makes no degrees. It is sweeping and includes all negligence. It makes no exception of gross negligence. The plaintiff and defendants both knew that there was a liability to accidents from gross as well as from slight negligence. They use the word negligence in its general legal sense, to embrace all accidents or injuries resulting from carelessness or non-feasance of the defendants' agents. Nothing else, it seems to me, will satisfy the fair meaning — the plain import—of the contract. The plaintiff's injury resulted from a collision between the cars of the train in which he was riding as passenger, and some

cars standing on the track. It was of course a case of negligence to have such a collision occur; but collisions do happen quite frequently, and that was well known to the plaintiff and to all the public. This cause of injury was most obviously within the contemplation of the parties, for it is the most fruitful cause of accidents and loss and injuries in railroad traveling. All collisions of trains must be the result of negligence in some degree, perhaps in the scale or degree of gross negligence. But with this ticket as his title and authority to ride in the defendants' cars, and as the contract on which the defendants agreed to carry him, I think the defendants are not liable for any injuries except such as were the result of fraudulent, wilful or reckless misconduct on the part of the defendants' officers or agents. I put the exemption from liability for injuries resulting from negligence entirely upon the terms of the express agreement between the parties. If the plaintiff had been riding at the time, gratuitously upon simply a free ticket or upon the invitation of the defendants as matter of favor, courtesy or otherwise, the defendants would be liable." JOHNSON, J., concurred in this opinion. STRONG, J., dissented. The case then went to the Court of Appeals, where the judgment of the Supreme Court was affirmed.[42] GOULD, J., who delivered the opinion of the court, took the same grounds as were relied on in the court below, and his conclusions were adopted by DENIO, DAVIES, ALLEN and SMITH, J. J. SELDEN, C. J., was absent. SUTHERLAND, J., dissented in an elaborate opinion in which WRIGHT J., concurred. The student is referred to a previous chapter where a lengthy extract from this opinion will be found;[43] therefore only that portion of it not given before need be set out here. "I think too," he said in conclusion "it may be said that to enforce the contract in question would interfere with the policy of the very laws from which the defendants derive their existence and their powers.

[42] 24 N. Y., 181 (1862).
[43] *Ante*, Cap. III. § 75.

They are a private corporation, yet in theory at least, they were incorporated from public considerations and for the public good. Hence the powers given to them which interfere so materially with private rights. They are constituted carriers of persons and property, and are expressly made liable for any damages occasioned by their neglect of duty. As carriers of passengers as well as of property, they may be considered as acting in a public capacity, and as a kind of public officers. Their admitted obligation to carry all passengers who present themselves and are to pay the usual fare, is conclusive evidence that they are considered as acting in a public capacity in carrying passengers. The care and diligence then, expressly imposed upon them as carriers of passengers by the very law defining their powers and duties as a corporation, is imposed upon them as a public duty. Can it be said that any contract tending to prevent, or relax or modify the performance of a public duty imposed by law, is valid? Is not such a contract void, as against the policy of the law imposing the duty? Moreover, I think it can properly be said that the defendants had no power to enter into the contract or arrangement which was made with the plaintiff. And on this question of power, all the considerations of public policy before adverted to are proper and apply. It was a speculative contract outside of their charter. It can not properly be said that they undertook to carry the plaintiff free or without consideration. They undertook to carry him in consideration of his agreeing not to hold them responsible for any injury, even for an injury resulting from their neglect of a legal public duty. Can it be supposed that the legislature ever intended to give the defendants the implied right or power to enter into any such contract or arrangement with their passengers? I think not. All the considerations of public policy before adverted to forbid the idea. The duty of due care and diligence is cast upon the defendants by the law creating them a corporation, and they cannot cast it off by contract. It has been said that the cases holding that a servant can not

recover of his master for the negligence of his fellow servant in the same business or employment, show that the contract in question is valid. It is said, I believe, in some of the cases, that these decisions rest partly upon the ground that the servant entering into the employment must be supposed to contract to take upon himself the risks of the negligence of his fellow servants. But there really is not in such cases any contract, express or implied. The general rule of law is that the master is responsible for the negligence of the servant. The real ground of the decisions last referred to, I take to be that the policy of the rule itself does not require its application in such cases. The reason of the rule ceasing in such cases, the rule is not applied. Indeed, it may be said that the policy of the rule itself is promoted by not applying it in such cases; for it is evident that by not applying it, it is made the interest of servants to be watchful of each other, and to inform the master of each other's delinquencies."

In *Smith v. New York Central Railroad Company*,[44] the plaintiff's intestate was injured while traveling on a drover's or stock pass, which contained the condition: "And it is further agreed between the parties hereto that the parties riding free, to take charge of the stock, do so at their own risk of personal injury *from whatever cause*." The injury was caused on account of an old emigrant car, unsafe by reason of having a flat wheel, being attached to the train. The plaintiff had a verdict and judgment for $5000, which on appeal to the Supreme Court was affirmed. The decision in *Welles v. New York Central Railroad Company*,[45] was approved. But the court held that the present case differed from that in two particulars. In the first place, the contract in *Welles'* case expressly excepted negligence while in this it did not. Nor would the words "from whatever cause" be construed to include negligence. Secondly, the plaintiff in this case was not a strictly gratuitous passenger

[44] 29 Barb. 132 (1859).
[45] 26 Barb. 641 (1858).

as Welles was. The price which he had paid for the transportation of his cattle and the care which he contracted to take of them during the journey constituted a sufficient consideration for his own passage. There was no dissent on these points by any member of the court. The case was then taken to the Court of Appeals where the judgment below was affirmed by a divided court — five judges against three.[46] WRIGHT, J., held that the negligence was that of the corporation itself in furnishing an unsafe car; that the words in the pass "from whatever cause" did not include negligence; that the plaintiff was not a gratuitous passenger and, therefore, the contract was clearly void. He also expressed the opinion that a contract which "would obviously enable the carrier to avoid the duties which the law enjoins as regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier which is perhaps the only one adequate to secure the highest degree of caution and vigilance," was contrary to public policy even where no fare was paid.[47] SMITH,

[46] 24 N. Y. 222 (1862).

[47] Wright, J.: "In this case Ward [the plaintiff's intestate] was not a gratuitous passenger. He had compensated the carriers not only for the transportation of his stock, but for the carriage of himself to take charge of it. He is to be regarded in the same light as a passenger who has paid a compensation for being carried. Whatever may be said, therefore, in respect to a person riding free in pursuance of an agreement to assume all risks, the direct question here is, whether it is against the policy of our laws for a railroad company carrying a passenger for a compensation to contract with such passenger for exemption from liability for its negligence. That it is I can not entertain a doubt. If, then, the agreement in this case is to be construed as releasing the defendants from all liability for personal injury to Ward from their own culpable negligence and misconduct, and absolving them from all responsibility for his safe carriage, it is void. But was that the tenor and effect of the agreement? The contract in which the stipulation is found, related to the transportation of his hogs, and that contract provided that the owner should assume certain risks in respect thereto, and either accompany the train himself to take care of them or furnish other persons to discharge that duty. With respect to the property, the company assumed to safely transport it and take upon themselves all risks of transportation except those specified. They were to furnish the means of transportation —

J., was for affirming the judgment on the first ground stated by WRIGHT, J. DENIO and DAVIS, JJ., were of opinion that a contract by which a railroad corporation exempted itself from liability for the negligence of its agents in respect to a purely gratuitous passenger was not forbidden by public policy, but it was different with regard to a paying

provide the road, attendants, supervision and motive power, and secure sufficient cars, except in the single respect to the floors, frames and doors of such cars. As to these things there was no attempt to limit their common law liability as carriers of property, and for loss or damage occurring to the owner during such transportation from causes other than those, the risks of which he had assumed, the liability as common carriers continued. They were responsible for any loss to the owner resulting from neglect to provide either a sufficient roadway or secure and road-worthy vehicles for the transportation, except as respected their floors, frames and doors. They were liable for any degree of negligence of themselves or their servants in the transit, except as to those things which the owner undertook to relieve them from, and take upon himself the risk. This is the nature and effect of the contract as to the carriage of the property. But in it is embodied the stipulation that persons accompanying the train to take charge of the stock do so at their own risk of personal injury from whatever causes. It was a convenience to both parties and a part of the contract that a person should ride along to take care of the stock. Now we are asked to presume, whilst the agreement bound the carriers to safely transport the property, and the law held them responsible as insurers except so far as they had succeeded by agreement to limit such liability, that the parties intended that the persons in charge of the property should assume all risks of personal injury, whether resulting from the culpable negligence and misconduct of the carriers or otherwise; and that it was intended that the carriers should be held for loss occurring from their negligence in the transportation of the property, but absolved from all liability for injuries caused by such negligence, however gross or culpable, to the persons in charge of it. This could not have been the intention, nor will the law presume that it was, so long as there were other risks to which the stipulation might naturally and properly apply, and more consistently with honesty and fair dealing. It will not be presumed that Ward intended to hold the carriers for loss occasioned by their omission of care in the transportation of his property, but to excuse them from any liability for injury to himself whilst taking care of it, though having no control or management whatever of the railroad; nor that the carriers, after becoming a party to a contract for the carriage of live stock, a part of which contract was that a person should ride on the train to take care of such stock, intended that the person should take on himself the risk of personal injury, even though they should omit the ordinary precautions

passenger, and a person traveling under the circumstances proved in this case they held was not a gratuitous passenger. SUTHERLAND, J., concurred in affirming the judgment on the grounds stated by him in the *Welles* case, viz., that the contract for exemption for negligence was void, irrespective of the question whether the transportation was gratuitous or for hire. SELDEN, C. J., ALLEN and GOULD, JJ., dissented.

Perkins v. New York Central Railroad Company, decided by the Court of Appeals in 1862,[48] was the case of an absolute free pass given to the plaintiff's intestate by a director of the company and entitling him to ride free on the cars of the New York Central Railroad Company from Rochester to Albany, during the year 1858. On the ticket was this notice: "The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using this ticket," to which his attention was particularly called at the time he received it.

which a man observes in taking care of himself or his own property. The most reasonable construction to be given to the stipulation in view of the circumstances under which it was made and the only one I think the law will permit is this: The persons riding on the train to take care of the stock will do so at their own risk of personal injury from causes not produced by the wilful misconduct, gross negligence or want of ordinary care of the carriers or their servants in the control and management of the railroad on which themselves and the stock were to be carried. Had Ward, in general terms, agreed to assume all risks as to the transportation of the stock, the carriers would still have been liable for gross negligence or a want of due care. The parties might by such agreement have succeeded in establishing the relation as to this transaction of an ordinary bailee and private carrier for hire. But a private carrier for hire is answerable for gross negligence or a want of due care. There are cases in respect to the transportation of property giving a similar construction to stipulations as broad and comprehensive as the present one."

[48] 24 N. Y. 196. This case in the court below appears not to have been reported.

While going in the defendant's cars from Rochester to Albany on the morning of the 11th of May, he was killed in consequence of the breaking of a bridge over the Sauquoit creek. On the trial it was proved that the bridge was built of unsuitable materials negligently used by the trackmaster of the road in its construction. The trial judge instructed the jury as follows: "If Perkins was riding upon the free pass, he was riding upon the conditions annexed to it. But notwithstanding such conditions, if the negligence of the defendants was gross and culpable; if it was of such a character that it would subject the party to prosecution for fraud or crime—then it does not come within those conditions. In other words, if this ticket is in the nature of a contract, the parties to the contract did not contemplate such cases as are fraudulent or criminal in their character. The statute provides that when culpable negligence causes the death of a party, such negligence amounts to a felony. If you shall find that negligence in the construction of the bridge, or in suffering it to remain in that condition, was gross and culpable in its character amounting to a fraud or crime, the defendant is liable notwithstanding the conditions of the pass, and you are to determine from the evidence what the character of this negligence was. You will look at this case exactly as if Evarts, the trackmaster, was the owner of the road, and if there was such a degree of negligence as to amount to gross or culpable negligence on his part, such as would subject him to indictment for manslaughter had he been the owner of the road—then the defendants are liable because his negligence is their negligence. The statute, in regard to such negligence, is this: [reading the statute definitive of manslaughter in the fourth degree for culpable negligence]. If the negligence of the trackmaster came up to this, so that he would be indictable, the defendants are liable although Mr. Perkins was riding on a free pass and notwithstanding its conditions." The jury found a verdict for the plaintiff for $5000 which, on appeal to the Court of Appeals, was reversed. The opinion

of the court was delivered by E. D. SMITH, J., who said: "Assuming that the pass on which the deceased was riding is to be regarded as a free ticket, and that the defendants were carrying the deceased gratuitously, independently of the question whether Mr. Perkins expressly agreed to assume all risk of accidents upon the trip, the defendants would be clearly liable for any injury sustained by him if he had survived the same; and in this action, on the same ground, would be liable also to the plaintiff. Having received the deceased into their cars, they would, in this view, be bound to carry him safely. They were and are not bound to carry him or any person gratuitously; but undertaking to carry him, they must do it carefully, as with other passengers. This was settled, in principle, in the case of *Coggs v. Bernard*.[49] In that case the defendant undertook to take up several hogsheads of brandy, then in a certain cellar, and lay them down again in a certain other cellar, and did the work so carelessly that one of the casks was staved and a great quantity of the brandy lost. The defendant was a mere private person, and it was claimed that as he was not a common porter and was acting gratuitously he was not liable. But upon very full argument and after much consideration, it was held that having assumed and undertaken to do the work, he was bound to do it carefully, and was liable for any injury resulting from his negligence. This precise question was decided in this court in *Nolton v. Western Railroad Corporation*,[50] and in the Supreme Court of the United States in *Philadelphia & Reading Railroad Co. v. Derby;*[51] in *The New World v. King;*[52] and in *Gillenwater v. Madison & Indianapolis Railroad Company*.[53] Assuming, then, that Perkins agreed to take 'all the risks of accidents, and expressly agreed that

[49] 2 Ld. Raym. 909 (1704).
[50] 15 N. Y. 444 (1857).
[51] 14 How. 468 (1852).
[52] 16 How. 477 (1853).
[53] 5 Ind. 340 (1854).

the defendants should not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person'—for such are the terms of the ticket—the question remains, what is the extent and force of such agreement? Upon its face, it is clearly sufficiently comprehensive to embrace every description of accident, casualty or risk attending railroad travel. But it must obviously be subject to some limitation and qualification. It ought not to be considered as applying to such risks as could not have been within the intent and contemplation of the parties, and can not apply to such as are not within the legitimate compass of contract upon principles of public policy. The learned judge who tried this case at the circuit charged the jury that 'while if the deceased was riding upon the pass, he was riding upon the conditions annexed to the pass, yet notwithstanding the conditions thus particularly expressed, if the negligence of the defendants was gross and culpable; if it was of such a character that it would subject the party to a prosecution for fraud or crime—then it does not come within these conditions.' In other words, that if the ticket is in its nature a contract, the parties to the contract did not contemplate such cases of negligence as are fraudulent or criminal in their character. The rule of exception from the apparent scope and purview of the contract, asserted in this part of the charge, I think can not be sustained. It states that fraudulent and criminal negligence is not within the scope of the contract. This would clearly be so, if the defendant were a natural person and was stipulating in respect merely to his personal acts. And if it were not so, fraud vitiates all contracts; and no person will be allowed to stipulate for crime. If the defendants were private persons, who could commit crime and could be indicted and convicted under the statute of murder or manslaughter for killing Mr. Perkins, most certainly such crime would not be within the purview of this contract. It is quite clear that Mr. Perkins never intended to agree, or the defendants to stipulate, that they, by their defendants or agents, might

kill him. Such was not the bargain. No one will pretend that the right to commit murder or suicide could be embraced in this or any contract. Like all other agreements, this contract must be construed in the light of the existing facts and circumstances at the time it was made, and not derive its construction from subsequent events. Parties in making a contract must be held to contemplate all the ordinary and possible incidents, accidents or contingencies which may attend its execution; and such accidents and contingencies must be deemed within the purview of the contract, not as accidents expected, but as accidents possible.

"What, then, did these parties mean by this contract? The cardinal rule of interpretation is, what was the intent of the contracting parties at the time of making the contract? In the light of this rule, what are the facts? Perkins applied to the defendants' director for a free pass. A free pass means the privilege of riding over the defendants' railroad without payment of the customary fare. The defendants are a railroad corporation, exercising the rights and subject to the responsibilities of common carriers, and liable, in a civil action, in this capacity, for all injuries to persons or property transported by them resulting from the negligence or unskilfulness of their agents or servants. The business of the defendants is all necessarily performed by agents and servants, and the defendants are necessarily obliged to employ a large number of persons as such agents and servants, some of whom will be more or less careless or negligent, notwithstanding and in despite of the utmost care, diligence and caution in their employment. The defendants are transporting persons and passengers by the powerful agency of steam; and when accidents did occur, they were liable to be attended, more or less, with very serious consequences. This the parties both well knew, and they also well knew that railroad accidents were of frequent occurrence; that railroad travel was subject constantly to perils resulting from the careless and negligence of engineers, conductors, baggagemen, brakemen, switch-tenders,

and others; that trains were frequently thrown off the track or came in collision and were subject to a variety of accidents and casualties against which no human prudence or skill in the employment of agents could entirely guard; and that all such accidents involve unavoidably, more or less, loss of life or limb or bodily injury, and other disastrous consequences. With perfect knowledge of these facts, Mr. Perkins asked for and accepted the free pass, upon the express condition that he should 'assume all risk of accidents' and expressly agreed 'that the company shall not be liable under any circumstances, whether by the negligence of the defendants' agents or otherwise, for any injury to the person.' Such is the bargain. It can mean nothing else than that Perkins will take for himself the risk of all accidents and injuries to his person attending his contemplated trip in the defendats' cars from Rochester to Albany, so far as such accidents and injuries might result from the negligence of the defendants' agents and servants. The defendants, in view of the accidents attended with much pecuniary loss resulting constantly from the negligence of some of their agents, proposed to carry Mr. Perkins without charge to Albany upon condition that he would take for himself the risks attending the trip. The question between the parties was simply which should take the risk of such accidents as might occur in consequence of the negligence of some of the defendants' many agents. Without an agreement exempting and absolving them from all liability in respect to such accidents, and the injuries resulting therefrom, the defendants would be legally responsible for such injuries. Mr. Perkins assumes the risk for himself. He becomes his own insurer. He absolves the defendants in advance from all liability 'for any injury to his person' from such negligence. It was a fair insurable risk, and Perkins agreed to assume it for himself. If this be the contract, upon what principle it can be claimed that it does not embrace the accidents which may result from the gross negligence of the defendants' agents, I can not conceive.

The contract makes no exception in respect to degree of negligence. It embraces all degrees. It uses the term negligence in its general generic sense. To hold that it does not embrace gross negligence is to interpolate into it a qualification not made by the parties, and which tends materially to impair and nullify its force, for the parties well knew that accidents were liable to result from the gross negligence of defendants' agents, as well as from inferior negligence. The contract related to the acts of third persons, acting as agents of the defendants. Perkins agreed to take his risk in respect to the negligence of such third persons. He took it entirely. If the agents were guilty of criminal negligence, which is only another name for gross negligence when it causes death or injury to life or limb, the agent himself is punishable criminally for such negligence. The principal never could be so punished. His civil responsibility, therefore, is discharged by the contract. There is no reason why the defendants should be responsible for the gross negligence of their agents, more than for slight negligence. To the principle asserted in the charge, I have tacitly assented in two cases, in *Bissell v. New York Central Railroad Company*,[54] and in this case at general term which follows, and was decided upon the authority of that case. But I am satisfied upon reflection that it is essentially unsound. * * Upon the ground taken in that part of the charge referred to, that if the negligence of the defendents' agent, Evarts, was gross and culpable, it was not embraced within the contract, and the defendants were liable in this action for the consequences resulting from such negligence, the learned judge, I think, erred; and the verdict can not be sustained." SELDEN, C. J., DENIO, DAVIES, ALLEN and GOULD, JJ., concurred.

Bissell v. New York Central Railroad Company [55] is the last of these great cases, and is perhaps also the most important, having been argued three different times in the

[54] 29 Barb. 602 (1859).
[55] 29 Barb. 602 (1859), 25 N. Y. 442 (1862).

Court of Appeals. As in *Smith's* case,[56] the ticket whose conditions the defendants successfully availed themselves of was a stock pass, and the facts were these: On the 5th of September, 1855, Josiah L. Bissell, the husband of the plaintiff, took passage on the defendants' railroad from Buffalo to Albany, upon a ticket received from the defendants, which read on its face as follows:

"New York Central Railroad. Cattle Dealer's Ticket on Passenger Train. Good for two days from date. Conductor will pass Taylor & Bissell, owners of two cars of live stock, from Buffalo to Albany.

[*Not transferable.*]

"If presented by any other person than the one named herein, the conductor will take it up and charge the person holding the same the regular fare. Sept. 5th, 1856.

D. L. FREMYRE.

[*Turn over.*] E. CLARK, jr. Agent."

The following notice was printed on the back:

"The owner of stock receiving this ticket assumes all risks of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the stock of said owner, shipped by stock or freight trains."

On the same day Bissell shipped on board of the defendants' cars, for the firm of Taylor & Bissell, two car loads of cattle, and signed a printed agreement relative to the transportation of the cattle, which contained the following clause: "And it is further agreed between the parties hereto, that the persons riding free to take charge of the stock, do so at their own risk of personal injury, from whatever cause." On the same day, at about 10 o'clock in the evening, while Bissell was sitting in the passenger or emigrant car attached to the freight train which carried the cattle, at Port Byron, in Cayuga county, which was waiting for the express passenger train from the west to pass, the

[56] *Supra.*

express train came up and the locomotive attached to the express train ran into the car where Bissell was, and killed him and five others. The jury found that the death of Bissell was caused by the gross negligence of the agents and servants of the defendants. The circuit judge in his charge to the jury, stated to them the different degrees of negligence as recognized by the common law, and that the defendants could only be held liable for gross negligence. The jury found a verdict in favor of the plaintiff for $5,000, which on appeal to the Supreme Court was unanimously affirmed, the following opinions being delivered by the judges named:

JOHNSON, J.: "The jury have found, by their verdict, that the death of Bissell was occasioned by the gross negligence of the agents of the defendants at the time of the collision. Being negligence of that character which resulted in the death of several human beings, it was criminal in its nature, and would have subjected the guilty agent to indictment and punishment under the statute. Neither the contract nor the ticket can be construed to refer to injuries from such a cause. It would be against the settled rules of construction to hold that injuries from criminal causes were intended by the parties. In *Welles v. New York Central Railroad Company*,[57] it was conceded by the learned judge who delivered the opinion, that negligence so culpable as to imply fraud or bad faith would not be one of the risks assumed by the passenger, when, by accepting a free ticket or pass, he had expressly agreed to assume all risk of accidents, whether occasioned by negligence of the company's agents or otherwise. The injury here arising from a cause not within the risk constitutes a good cause of action against the defendants. Whatever may be said in the books about degrees of negligence they are clearly recognized by our statute, which makes culpable negligence by which a human being is killed manslaughter in the fourth degree. The remark of the judge in his charge to the jury, that it

[57] 26 Barb. 641 (1859).

seemed to him a case of gross negligence, is no ground for an exception. The whole question was submitted to them. I do not find any error in the charge or in the refusal to charge, and am of the opinion that the order refusing a new trial should be affirmed."

STRONG, J.: "I concur in the result of the foregoing opinion; but I think there is no difference in principle between this case and the case of *Welles v. New York Central Railroad Company*.[58] In the latter case, it was admitted by the parties that the plaintiff took passage at Lyons for Albany on a passenger train of cars of the defendants; that while seated in the forward passenger car, a collision occurred between that train of cars and the cars of a freight or cattle train standing on the same track of the defendants' road, whereby the baggage car of the passenger train was driven back into the car where the plaintiff was seated, and he was injured; and that such collision and injury were occasioned by carelessness and negligence of the defendants and their servants in charge of the respective trains. This was all the evidence in the case in explanation of, or in regard to, the collision. If the negligence thus proved was not a misdemeanor for which an indictment would lie at common law, it was certainly as culpable as the negligence in the present case. Fortunately, the consequences were not so serious; but that makes no difference as to the grade of the negligence. There is no force in the idea suggested that as the parties have not designated the degree of the negligence, the court must regard it as simply ordinary negligence; for without reference to the admission in terms of negligence, the facts admitted, unexplained, show gross or culpable negligence. The defendants with one train of cars ran into another train of the defendants on the same track; and upon these naked facts the law would not presume there was a justification, excuse or palliating circumstance, not offered to be proved, but adjudges there was neither.

[58] 26 Barb. 641 (1858).

The principle of liability in this was, in my opinion, equally applicable in the other case."

SMITH, J.: "In the conclusion to which my brother JOHNSON has come in this case, and in his reasons in the main, I concur, but not in the view of my brother STRONG, that there is no distinction in principle between this case and that of *Welles v. New York Central Railroad Company*.[59] It seems to me that the verdict in this case can be sustained, and both decisions stand together. It was not intended to deny in the case of Welles, that there were not different degrees or shades of negligence, but to express a doubt whether these degrees could be defined with sufficient distinctness for any practical purpose. But however this may be, there is obviously such a degree of negligence as in common and legal language is known and designated as gross or culpable. The legislature has called this degree of negligence, in sections 6, 13 and 19 of article 1, title 2, chapter 1, part 4 of the Revised Statutes,[60] in defining manslaughter, culpable negligence. The 19th section is as follows: 'Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not in said act declared murder or manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." This degree of negligence, whether called culpable or gross, means the same thing—that want of care and regard to his duty which every man of common sense applies to himself and his own affairs or property. From the consequences resulting from this degree of negligence, whether death ensue or not, no person can claim exemption by contract. If the defendant was a natural person, and the negligence was his, as the jury have found this to be a case of gross negligence, nothing further need be said in support of their verdict. But the defendant is a corporation aggregate, and

[59] 26 Barb. 641 (1859).
[60] 3 R. S. 5th ed.

could not be guilty of manslaughter or any other crime. As it has no soul, it can incur no moral guilt. It acts necessarily through officers and other agents. This fact, obviously, should not confer upon it any degree of irresponsibility in the affairs of business which would not apply to natural persons. Its agents must necessarily be liable criminally, like all other natural persons, and civilly for wilful wrongs. The case of Welles was put upon the distinction between the negligence of the principal and the negligence of his agents and servants.

"The defendants are common carriers of persons and property. A common carrier is one who undertakes for hire or reward to transport the persons or goods of such as choose to employ him from place to place. As the obligation which the carrier assumes rests upon the basis of contract, express or implied, it would seem that in point of principle he must possess the same right with other persons to make his own contracts. But this right is clearly subject to some restriction. The carrier is deemed to exercise a *quasi* public employment; and for this reason and in this respect, it has long been held that public policy requires some limitation upon this absolute right. The defendants are a railroad corporation and exercise a public franchise, and as such are doubtless subject to legislative control and restriction in regard to the manner of doing their business, and in regard to the character and extent of their undertakings and obligations with individuals. But as common carriers, independently of particular legislation, they stand upon the same common law footing with natural persons, and the measure of their responsibility is precisely the same. Civilly, the defendants, as common carriers of persons for hire or reward, are liable for all injuries resulting from the negligence, carelessness or unskilfulness of their servants and agents, and from all such acts of negligence for which, if they were natural persons, they would be liable criminally. They clearly can not exempt themselves from civil responsibility by contract. Precisely the same obligation

rests upon them, and the same restriction upon their right to limit their responsibility by contract exists, as would apply to a natural person in their place.

"When railroad or other corporations assume the duty and employment of common carriers, as in this case, and act entirely by officers and agents, as they necessarily must, I conceive that they can not contract for exemption from responsibility for whatever pertains to the proprietorship of the railroad, nor for the acts of that class of superior agents who act for and in the place of the corporation, as officers, directors or other managing agents, and who, as such, within the trust confided to them, control and direct the operations of the corporation, and employ its inferior servants and agents. If a single natural person, for instance, owned the defendants' railroad and its property, and operated the same for his own benefit, he would be bound to employ and provide skilful, careful, sober and proper persons as engineers, conductors, brakemen, switch-tenders and in all other positions, and would be bound to see to it that the tracks of his railroad, its bridges, turn-outs and all other portions of his road, and the locomotives and cars in use thereon, and all the appurtenances of the road, were in a safe and proper condition. He could not stipulate for immunity from injuries resulting from negligence in respect to any such particulars, no more than he could for bad faith or fraud. All contracts exempting him, or seeking to exempt him, from responsibility for his personal negligence or fraud, would be repugnant to public policy, and absolutely void. And the same rule, I think, should be applied to corporations. Public policy forbids the making by them of any contract that shall exempt them from responsibility, that would not be allowed to a natural person exercising the same precise employment. A private person, operating this railroad as his own, might stipulate by express contract I think, that a person who should ride free over his road should take risk of the negligence of his subordinate agents and servants in running his trains; provided

that he himself was free from all negligence in their employment, direction or otherwise. No one has a right to require a common carrier to transport him or his property without charge and at his own risk. And I can conceive no legal objection to a contract fairly and distinctly made, between a common carrier and a passenger who pays no fare, that the latter shall take his own risk in respect to the negligence of subordinate agents or servants in their appropriate sphere. And this is all we meant to decide in the case of Welles. No man who pays his fare will be likely to make such a contract, or voluntarily to relinquish any safeguard for his personal security.

"In this case the plaintiff's husband made and signed with his own hand an express contract, in which it is stipulated that the persons riding free on the defendants' road to take charge of stock, do so at their own risk of personal injury from whatever cause. And he also received from the defendants' agents, at the same time, a ticket with an indorsement thereon, stating that the person receiving the same assumed all the risk of accidents, and expressly agreed that the company should not be liable under any circumstances, whether of negligence or otherwise, for any injury to the person. In such a case I conceive that there is no liability on the part of the defendants, except such as would exist between two private persons when one undertook to carry the other gratuitously from one place to another, for the personal accommodation or pleasure of the latter. The defendants would not be subject to the responsibilities of common carriers, but would be liable simply as bailees, as in the case of a naked depositary without reward, or a mandatary, who are only responsible for gross or culpable neglect. In this view of the defendants' responsibility, in either aspect of the case, I find no difficulty in sustaining the verdict. The jury have found that the case was one of gross negligence, and this gross negligence was the negligence of the principal, in the employment of the very careless, incompetent and stupid, if not drunken, switch-

man, whose heedlessness caused the collision of the trains which produced the death of the plaintiff's husband. Such, doubtless, was or may have been the opinion of the jury and the grounds of their verdict. On these grounds I think it entirely correct and proper.

"In the case of *Welles v. New York Central Railroad Company*,[a] there was no such proof, and no evidence showing how the collision happened; nor any evidence that would warrant a jury in finding that any particular person, agent or servant, whose negligence caused the injury, was unfit for his place, or that any negligence had been committed by the defendants in their scheme or direction for the running of the trains, or in the employment of any of their agents or servants. It was stipulated in the case by the attorneys, that the injuries were occasioned by the carelessness and negligence of the servants and agents of the defendants in charge of the two trains at the time of the collision. The express agreement of Welles, in that case, extended to, and was obviously designed to cover and embrace, the risks which would attend, and the casualties which might result from the negligence of just this class of subordinate servants and agents, and where there was no fault or negligence on the part of the defendants, as proprietors of the railroad, in providing, to the utmost extent of care and diligence on their part, to prevent such casualty. Upon this discrimination between the acts of the principal and the agent, I think that the case of Welles was rightly decided; although some expressions in the opinion may require qualification. And that the verdict in this case can be sustained without involving any inconsistency between the two cases. I concur, therefore, in the decision that a new trial be denied."

But the judgment of the Supreme Court was reversed by a majority of the judges of the Court of Appeals where the case was taken on appeal. GOULD, SELDEN, SMITH, DAVIES and ALLEN, JJ., voting for reversal, DENIO, C. J.,

[a] 26 Barb. 641 (1859).

WRIGHT and SUTHERLAND, J. J. dissenting, and delivering the following opinions.

GOULD, J.: "It is fully conceded that in this court there is no question that the contract for carrying the cattle at reduced rates, in consideration that the owner assume certain risks as to them, is a valid contract. And this court[62] has this year decided that a contract by a passenger to take the risk of injury to his person in consideration of riding free, is a valid contract. In the case before us, the ticket upon which the deceased was riding is a free ticket, a pass without paying. And in consideration thereof, the passenger assumed all risks, etc. The same person at the same time made another contract, that in consideration of the carrying of his cattle at reduced rates, he assumed certain risks in regard to them; and in that contract he provided that the person riding free to take care of the cattle should assume certain risks. Calling these two contracts together one contract makes no difference with the reason of the ruling applicable to each of them separately. Do contracts of which each separately is good become invalid because combined or contained in one instrument. Is a passenger's contract to assume risks on one consideration, (riding free) good; but bad when you add the other consideration—that his cattle are carried at a reduced price? Further, if he may make a contract by which he shall ride free, may he not by contract say that he is riding free, although he has paid for the transportation of his goods? How has the court any right to alter his contract, and say that he is not riding free. Again, if he may by contract assume certain risks, in consideration of riding free, why may he not make a contract to assume the same risks, in consideration of being carried at half price, as he does for his stock? When we once hold that assuming these risks is within his power as matter of contract, the court has no power to interfere with his contract on the score of

[62] Wells v. New York Cent. R. Co, 24 N. Y. 181 (1862); Perkins v. New York Cent. R. Co., 24 N. Y. 196 (1862).

quantum of consideration, or on any ground but illegality of consideration. The judgment of the Supreme Court should be reversed, and a new trial ordered."

SELDEN, J.: "The following positions appear to be settled in regard to the duties and responsibilities of railroad corporations engaged in the transportation of persons and property in this State:

"1. In regard to the transportation of goods, they are subject to the absolute responsibility which rests upon common carriers, and are, therefore, insurers of the safe carriage and delivery of the goods, except against accidents towards the production of which no human agency has contributed.

"2. In the transportation of living animals, they are relieved from responsibility for such injuries as occur in consequence of the vitality of the freight, so far as such injury could not by the exercise of diligence and care be prevented; in other respects, their responsibility in regard to stock is the same which rests upon them in regard to goods.[63]

"3. In regard to the transportation of passengers, they are not in any respect insurers, but are answerable for any injuries to their passengers against which the utmost skill and foresight could guard.[64]

"4. This responsibility embraces not only any want of care and foresight on the part of the immediate agents of the corporation, but also any defects arising from want of care or skill in the manufacturers of the machinery or materials used in the structure or operation of the road, whether discoverable by any exercise of care and skill on the part of the immediate agents of the road or not.[65]

"5. The companies can not limit their responsibility by any notice, though expressly brought to the knowledge of those whose persons or whose property they carry; but they may secure such limitation by express contract with those persons.[66]

[63] Clarke v. Rochester &c. R. Co., 14 N. Y. 570 (1856).
[64] Bowen v. New York Cent. R. Co., 18 N. Y. 408 (1858).
[65] Hegeman v. Western R. Co., 13 N. Y. 9 (1855).
[66] Dorr v. New Jersey Steam Nav. Co. 4 Sandf. 136 (1850).

"6. Such limitation may be agreed upon in relation to the safety of property under any circumstances, whether carried gratuitously or for reward; and in relation to the safety of persons when they are carried gratuitously.[67]

"7. In such contracts the companies may lawfully be relieved from all responsibility for the negligence or misconduct of their subordinate servants and agents; the question being as yet unsettled what servants or agents, if any, are to be regarded as so directly representing the company that a contract relieving the company from responsibility for their negligence or misconduct may not lawfully be made.

"8. Whenever the companies are authorized to relieve themselves by contract from liability for the negligence of their agents, no distinction is made in regard to the degrees of negligence against which they may stipulate.[68]

"The questions which arise in this case are:

"1. Did the contract on which Mr. Bissell was traveling when the accident occurred, in its terms throw upon him the risk of personal injury from such circumstances as caused his death?

"2. If the contract embraced such a case, was it valid and binding?

"In regard to the first question, I think he must be regarded as traveling by virtue as well of the ticket as of the contract. They were both delivered at one time, and together constitute the contract. Each may be referred to in arriving at the terms of the whole contract, which was, in effect, but one and not two. That which is called the ticket was a part of the contract which Bissell might or might not have entered into. The effect of it was to give him the privilege of riding on the stock train, or on the passenger train, at pleasure; and when he made that a part of the contract, he was bound by all its terms, as well as the company. The conditions as to personal risk,

[67] Wells v. New York Cent. R. Co., 24 N. Y. 181 (1862); Perkins v. New York Cent. R. Co., 24 N. Y. 197 (1862).

[68] Wells v. Steam Nav. Co., 8 N. Y. 375 (1853).

under the head of 'notice,' on that ticket, are not confined to such risk when riding on the passenger train, but extend to all personal risks when riding on any train, under the contract, treating it as one. The language is, 'the owner of stock receiving this ticket assumes all risk of accident;' and that risk as stated covers all injury to stock or person, without reference to the train by which the person should be carried. I do not, however, regard this as material, because the terms of the other portion of the contract appear to me equally broad. The expression 'at their own risk of personal injury from whatever cause,' in connection with the other words of the contract, can not be held to exclude any injury which the party might receive, however occasioned, while riding or acting under the contract, and against which the company had a right to protect itself by contract.

"The remaining question is, was the contract valid?

"And first, was Bissell 'riding free to take charge of the stock,' within the meaning of those terms as used in the contract? It is not claimed that he paid anything for his passage, aside from the $70 per car-load which he paid for carrying the cattle. He was, therefore, doing exactly what the parties intended when they used the terms 'riding free,' and was bound by the contract to ride at his own risk as to personal injury. So far as the parties to the contract were concerned, he was 'riding free;' whether, in view of the law, he was carried by the company gratuitously, so as to authorize the company to relieve themselves from the consequences of negligence in his transportation, if their power to do so was limited to passengers thus carried, is another question. If it were necessary to decide that question, I am not prepared now to say what my conclusion would be. But I do not regard it as necessary. The principle being established that railroads may by contract relieve themselves from the negligence of their servants in the carrying of passengers when carried gratuitously, I can discover no rule of law or public policy to prevent their doing it on any

other terms which may be agreed upon between them and their passengers, and which shall furnish a consideration to the passengers for the risk which they assume.

"All the arguments which have been urged against the propriety and safety of allowing carriers to make such contracts, apply with as much force to cases where passengers are carried gratuitously as where they are carried for reward. So far as the public are concerned, the question of reward is one of indifference; and so far as the parties are concerned, if they are allowed to make the contract at all, they are the judges of the amount of consideration which will compensate them for assuming the risk, whether the whole fare, or half, or an eighth or any other proportion, or other consideration. I apprehend it is entirely safe to leave them to fix the terms. I refer, of course, to actual contracts, and not to attempted limitations of the carriers' responsibility, by means of indorsements upon tickets, not assented to by the passengers who receive them. If there was no limitation to the power of railroad companies in making such contracts, there would be great danger of public inconvenience in the establishment of such rule; but even then, after finding the law to be settled that such companies could protect themselves against liability by express contract, I should doubt the propriety of attempting to prescribe, by judicial decision, how great the consideration should be to render such contracts valid.

"The legislature, however, has not left the matter at large, but has probably done all which is required for the protection of the public or of individuals in this respect, by guarding them against the necessity of negotiating with any railroad company on this subject. On the offer by a passenger of the fare prescribed by law, the company is bound to transport him, and to assume all the risks which fall within the appropriately stringent rules above adverted to; and in case of refusal, such company is made liable for all damages resulting from such refusal. But if any one who wishes to travel with greater economy than by paying

the fare which the legislature has prescribed (or in the absence of legislation which usage has established), as the reasonable compensation for the transportation and risk, and prefers to pay less or to pay nothing, and to assume the risk himself, I do not think there is either danger or impropriety in allowing it to be done; and there is no principle upon which my mind can rest to justify the position that courts shall recognize such a contract as valid, when the company, in consideration of the passenger's assuming the risk, agrees to carry such passenger without fare, and declare it void, when, for the same consideration, the company agreed to carry him for half fare. The two cents a mile which the defendant is allowed by law to charge for carrying way passengers, and three cents a mile for other passengers, is what the law adjudges in the absence of usage fixing a less sum, to be a reasonable compensation for the expense of carrying the passenger, including the risk imposed by law, of his qualified insurance against injury. To hold that the defendant and the passenger may lawfully agree that the former shall be relieved from the risk and the latter assume it, and then to add that no such agreement shall be valid unless the defendant gives to the passenger for assuming the risk the full compensation which the law allows it to receive for risk and transportation united, would not seem to be reasonable. I should regard it as far more rational to deny to the parties all power to contract on the subject.

"Like all contracts, to render such a one valid it is indispensable that it have some consideration which it would not have if the passenger paid the full fare fixed by law. That is all which the company is allowed to receive for the service and the risk united, and it can no more demand the full compensation of both for the service alone, than it could demand the fare for a hundred miles for carrying a passenger fifty miles. If the service is reduced, the amount of reward must be reduced in proportion; and if the company is relieved from the risk, it must make compensation for

that relief by the reduction of fare or otherwise. The amount of such compensation like the consideration for all contracts, must be left to the agreement of the parties. The law has wisely, for the protection of passengers, guarded them against any necessity for negotiation on this subject. If they choose to do it voluntarily, I can discover no ground for saying that they may not make such terms as they please. I entertain no doubt, therefore, that this contract in this case was valid.

"It appears from the case that the defendant's superintendent testified on the trial that 'the price of fare for cattle freight was uniform, all one rate.' From this it has been argued by the plaintiff's counsel that Bissell was neither 'riding free,' nor at a reduced rate of fare, at the time of the accident. I have already given my interpretation of the contract in this respect, which does not accord with this position; but whether such interpretation is correct or not, the position of the counsel can not be made available now, it not having been presented on the trial. The trial appears to have proceeded on the ground that the intestate was traveling on a free ticket, and that the only question in doubt was whether the negligence of the defendant's agents was such as to render the defendant liable, notwithstanding the intestate was 'riding free' under an engagement on his part so to ride 'at his own risk of personal injury from whatever cause.' If he in fact paid as a passenger the full fare allowed by law, or the usual fare if less than that allowed by law, without reduction on account of his engagement to assume such risk, in my opinion the engagement would be without consideration, and not binding upon him or his representative. That question will doubtless be open to the plaintiff on a new trial, but as it was not presented so far as the case shows at the former trial, it can not be considered here. It is insisted that if the contract was valid, it only relieved the defendants from responsibility for the negligence of the persons having charge of the train on which Bissell was riding. This is a

mere question of interpretation of the contract. The question is, what did the parties intend by the words which they have used? The principle being established that parties may lawfully enter into contracts of this nature, there is no limit to the extent and variety of modification which may be given to such contracts. The passenger may assume all risks arising from the condition of the track, or from the condition of the locomotives or of the cars, or all risks from the negligence of the agents, of all of them or of any class of them. There is no danger which the party may encounter, resulting from the journey, which he may not assume the responsibility of, and he may assume all or any portion of it. This contract in itself exemplifies all this. In regard to the stock the owner assumes certain defined risks, confined to a very narrow circle, and all the risks beyond those are still charged upon the company. On the other hand, with regard to his 'own risk of personal injury,' he assumes it by words as comprehensive as the language affords, 'from whatever cause;' and he 'expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person.' I can imagine no injury which the passenger could receive as the consequence of his journey against which the company has power to protect itself by contract, which is not embraced by these terms and which he has not assumed. The terms of the contract in this case supply what was wanting in the case of *Wells v. Steam Navigation Company*,[69] to exempt the carrier from responsibility for the negligence of agents.

"The 36th section of the general railroad law which has already been adverted to, has been relied upon as establishing the defendant's liability in this case. That section is in the following words: 'Every corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice; and shall furnish sufficient accommodations for the transporta-

[69] 8 N, Y. 375 (1853).

tion of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting and the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freights for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.' The argument based upon this statute if it proves anything proves too much. If that section is applicable to this case to sustain the position for which it is cited, notwithstanding the terms of the contract under which the intestate was carried, I do not see why it would not render railroad companies absolutely 'liable to the party aggrieved in an action for damages for any neglect' in the transportation of persons or property. It would seem to make them insurers of the safety of passengers, as they were at common law for the safety of freight, against all dangers not arising from the act of God or the public enemies, and to super-add to that stringent rule of liability a prohibition against the modification of it by contract. Such an application of the statute would show all the decisions of this court, sustaining the right of railroad companies to reduce the extent of their liability by express contract, to have been erroneous. But if the statute should receive an interpretation more favorable for the carriers, as not increasing their liability, it can have no force in support of the argument in aid of which it is invoked, unless it is held to prohibit contracts by carriers reducing their liability; which would render it equally in conflict with the decisions before mentioned. The true object of this section of the statute has as it appears to me been correctly declared, viz., 'to bring these railroad lines within the general principle of common carriers, with such variations as the nature of the business required.' I do not think it was any part of that object to add to their general

responsibility as carriers, or deprive them of the power which they possessed prior to its passage of making contracts in regard to such liability. There are several exceptions in the case which properly present the principal points which I have considered, and which are well taken. The judgment should be reversed and a new trial granted."

SMITH, J.: "In the cases of *Wells v. New York Central Railroad Company*[70] and *Perkins v. New York Central Railroad Company*[71] this court decided—six judges concurring—that the carriers of passengers as well as other common carriers might restrict their common law liability by express contract. In each of these cases, the passenger was riding on a free ticket. In this case in like manner, the plaintiff's intestate was riding ostensibly also upon a similar free ticket. I do not see why this case is not precisely within the rule established in those cases, and why the doctrine of *stare decisis* does not require us to reverse the judgment in this case. The fact that the plaintiff's intestate was riding in defendant's cars, to accompany his stock carried as freight, and for which the customary charges were paid and received, can not as I see affect the question. The ticket which Bissell received, and which he used as a voucher to show his right to ride in a passenger car, was in fact a free ticket. He received it as a free ticket. Besides the indorsement on the ticket, he signed an express agreement, in which he engaged to take his risk in respect to all accidents or injuries to his person from the negligence of defendant's agents, or whatever cause. The argument that the rule in the *Wells* and *Perkins* cases can not apply in this case, because there was in fact a consideration received by the defendant for the carriage of the plaintiff's intestate, is not I think sound. It disregards the force of the ticket which he received, and on which he was in fact riding at the time of the accident, and which he received and used as a free ticket, and for

[70] 24 N. Y. 181 (1862).
[71] 24 N. Y. 196 (1862).

which he professedly paid no fare separately from the price paid for the transportation of his stock. But it is undoubtedly true that he received such free ticket, and it was given him by the defendants in consideration of the business and profits received from him from the freight of the stock which he accompanied. So, in all cases when free tickets are given, I suppose there is some consideration of interest, or profit or advantage, received or expected, which constitutes the inducement to the giving of the ticket. In this sense, there would probably seldom if ever be given by a railroad company a strictly free ticket. Nor does the liability of the carriers depend upon the question whether he received any actual pecuniary or other consideration for the transportation of a person over their road. Receiving a passenger into their cars for transportation, binds the carriers to carry him safely—as much so with a passenger who has paid no fare as with one who has paid full fare and purchased the customary ticket; and subjects them to an action for damages for any injury resulting from the negligence of themselves or their servants and agents. The exemption from such liability rests solely upon the ground of express contract. The fact that Wells and Perkins, in the cases referred to, applied for and received respectively a free pass, was doubtless the reason why they made the agreement to take their own risks. The company for the same reason made that a condition of giving them a free pass. It could not have made or imposed any such terms or conditions upon a person paying his fare; for upon the payment of the customary fare, they were bound to carry such passenger at their own risk in respect to all injuries resulting from the negligence of the company, its agents or servants.

"It can not be material as I conceive, whether a person who receives a free pass and agrees to take his own risk of accidents, and to become in effect his own insurer against the casualties of the trip, receive such free ticket to enable him to accompany his property, or for any other reason or con-

sideration. If he takes the free ticket and assents to the agreement indorsed thereon, or otherwise expressly agrees to take his own risk, he must in either case abide by his contract, and is bound thereby.

"In the decision of this case at the general term of the Supreme Court, I expressed the opinion that the action could be sustained on the ground that the negligence of the brakeman was the negligence of the corporation, for the reason that he was improperly employed, and was unfit for his station. This view, I am satisfied, was erroneous. The case was not tried upon this theory. I think the judgment should be reversed, and a new trial granted, with costs to abide the event."

DENIO, C. J., dissenting: "We have already decided that a railroad corporation may lawfully agree with a passenger who is carried gratuitously in its cars, that it will not be responsible for injuries resulting from the negligence of its servants.[72] If the plaintiff's intestate in the present case was by agreement to be carried, and was in fact carried by the defendants, wholly without compensation, the judgment referred to is a precedent for the decision of the appeal now under consideration, and the judgment appealed from ought to be reversed. But I do not consider the deceased in this case to have been a free passenger, in any proper sense. The firm of which he was a member contracted with the company for his passage by the written agreement which was given in evidence. That agreement contained mutual stipulations by each of the contracting parties. On the part of the company, the contract was to transport certain live stock belonging to the deceased and his partner, and also to carry the members of the firm or such other persons as the firm should employ to take charge of the stock during the transit, for a specified compensation, namely, seventy dollars for each car load of the cattle, which sum the contract obliged the firm to pay; and the contract to pay that compensation was the equivalent for the whole service

[72] Perkins v. New York Cent. R. Co., 24 N. Y. 187 (1862).

which the company had undertaken on its part to perform. If there had been no other stipulation in the written agreement, no one could doubt that the price of the passage of the person riding to take charge of the stock was embraced in the amount to be paid by the firm. It could not be determined what portion of the seventy dollars per car load of cattle was the equivalent for the transportation of the property, nor what part of it went to pay for carriage of the person in charge; but it would be entirely clear that the whole of the money paid by the firm was the compensation for all the services which the railroad company were to peform. But the contract also contained stipulations that the owners of the cattle were to take certain risks respecting them upon themselves, some of which risks would probably have otherwise devolved upon the company; but with those we have no present concern. There was, however, a stipulation in these terms, that 'the persons riding free to take charge of the stock do so at their own risk of personal injury, from whatever cause;' and it is stated in the instrument in effect that a smaller compensation was received by the company, on account of the assumption of the risks mentioned, than that which would have been required if they had not assumed these risks. I do not perceive that the portions of the contract which relate to the risks affect its construction upon the point under immediate consideration; namely, in determining what stipulations on the part of one of the parties are the consideration of the undertakings of the other party. It remains evident that in consideration of the money which the owners of the stock were to pay, the cattle were to be transported to their destination, and the persons riding on the train to take care of them were also to have their passage without any additional payment, The contract calls this 'riding free,' and it is so in a certain sense; that is, they get their passage in consideration of the other provisions of the contract, and free from the payment of the fare which is exacted of other passengers. The persons who were to

travel in consideration of the contract respecting the cattle, were not obliged to go in the cars attached to the cattle train, but were presented with passage tickets admitting them to seats in the ordinary passenger cars without further payment; but these tickets contain on one side a very distinct statement that the company is not to be liable for injuries to the person arising out of the negligence of the company's agents. If such a stipulation is legal, the passenger receiving the ticket must be deemed to have assented to it as one of the terms of his contract with the company.

"These considerations lead me to the conclusion that the deceased, when he received the fatal injury, was not traveling as a free passenger on the defendant's road so as to bring the case within the reason of the case of *Perkins*. The price of his passage was paid for by the other stipulations of the agreement. In *Philadelphia & Reading Railroad Company* v. *Derby*[73] and again in *The New World* v. *King*[74] passengers in the defendants' vehicles who did not pay anything, but the conveyance of whom was considered incidentally advantageous to the proprietors of the line, were held not to be gratuitous passengers. It seems to me, therefore, that the condition of the deceased, and the right of his representatives to recover damages on account of his death, are precisely the same as though he had paid his fare in money; and that the defendants are liable in this action, unless the agreement contained in the contract and repeated on the passenger ticket, to assume the risk of injuries caused by the negligence of the companys' servants, is a lawful and valid stipulation. It must be admitted that the owners of the cattle were enabled to contract for the services which the company agreed to render, at a less price than they would have been obliged to pay if they had not assumed the risks mentioned; for it is so expressly stated in the agreement. But I am of opinion that the defendants had no right, even by contract, to exonerate themselves from the

[73] 14 How. 468 (1852).
[74] 16 How. 469 (1853).

consequences of the negligence of their own servants, and to cast these burdens upon passengers who paid a compensation for their passage. The maxim, *modus et conventio vincunt legem*, is not of universal application, but is subject to certain limitations in cases where the interests of the public or of morality are affected by a contract. The general railroad act, the provisions of which are binding upon the defendants' corporation, after enacting that every railroad corporation shall start and run their cars for the transportation of persons and property at regular times and shall furnish sufficient accommodation for the transportation of all such passengers and property, and shall transport and discharge such passengers and property 'on the due payment of the freight or fare legally authorized therefor,' declares in terms that the corporation 'shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises.' The plaintiff's intestate entitled himself to the benefit of this provision by the payment of such fare as was required of him by the defendants. But he waived, if it was competent for him to do so, the liability of the defendants to respond to him in an action for damages imposed by this provision and by the general rules of law; and the general rule certainly is that one may at his pleasure renounce the benefit of a provision introduced into a contract or a law entirely in his own favor. But to this rule there is also a limitation of the same general nature as that to which I have just referred. The law will not allow parties by their contracts to subvert its own policy. If the public has an interest that railroad corporations should in all cases be and continue liable for injuries to passengers paying fare, occasioned by the negligence of their servants, and if the provision cited from the general railroad law was enacted in furtherance of that policy, it is not in the power of parties to change the rule in individual cases. The defendants claim a right to exempt themselves from the liability imposed by law, by special contracts with passengers. As to one class of passengers, that

to which the deceased in this case belonged, they have a standing form of a contract by which the responsibility for the negligence of their servants is shifted from their own shoulders to those of the passengers. If this arrangement shall be sustained, I do not see why it might not be applied to all cases. Suppose they should prepare a set of passenger tickets for which only one-half or three-fourths or any other proportion of the usual price should be asked, and which should contain a stipulation similar to the one printed upon the back of the passenger ticket furnished to the deceased in the present case. No passenger expects in his individual case to be injured or destroyed in the course of his journey, but the pecuniary advantage held out to him by such a ticket as I have supposed is direct and immediate. I have no doubt that a large proportion of the persons traveling by railroad would purchase the cheaper tickets and agree to become their own insurers. To the precise extent to which the arrangement should prevail, the pecuniary inducements of the corporation to the exercise of the high degree of care and vigilance which the peculiar nature of this mode of transit requires, might be expected to be relaxed. If we assume, as I think we reasonably may, that the provision of the statute declaring the liability of the corporation for the neglect of their servants was introduced for reasons of public policy and in order to secure the greatest degree of caution on the part of the managers of the railroads, such a practice as I have supposed would frustrate the intentions of the legislature.

"I concede that there is no direct authority for the conclusion to which I have arrived. But the subject itself is of recent origin. No arrangement in the whole range of modern civilization can compare with that by which many hundreds of people are carried at the same time, at an unprecedented rate of speed by the power of steam, from one part of the country to another, by various and complicated contrivances, where a very slight neglect would be likely to prove extensively fatal to life or limb. The circumstances were well

calculated to call for the most careful provisions on the part of the legislature in order to secure the utmost degree of care and circumspection. Railways are constructed and operated for purposes of pecuniary gain. The damages or compensation paid to parties injured, and to the representatives of such as are killed, constitute, unfortunately, a considerable deduction from the profits of such enterprises. The liability of the corporation to make such compensation is established by a public law. One object of the enactment was no doubt to enforce the rendering of justice to such persons as might suffer from the neglect of the corporations or their agents. If this were all, persons engaging passage on a railroad might waive their rights by a prospective arrangement; but if it be true, as I believe it to be, that there was a further motive such as I have suggested, namely, to secure the greatest degree of perfection in the mechanical arrangements, and of skill and caution on the part of the operators concerned in the management, then the provision was made in aid of a public policy in which every citizen of the State is interested, and which no one nor any number of persons by a private bargain with a railroad corporation, can weaken or subvert.

"It is laid down in all systematic treatises on contracts, that stipulations in violation of public policy are void, and the rule is exemplified by numerous adjudications. The familiar instances in which agreements in restraint of trade have been declared illegal, fairly exemplify the principle. The party thus binding himself does not thereby undertake to do anything wrong in itself; and it is not on his account that the contract is considered invalid. But the public at large have an interest in encouraging industry and enterprise, and in preventing monopolies. Although the principle referred to is a general one, it is not often that a court can be properly called upon to apply it to a new case. Men's minds may well differ as to what may or may not accord with public policy in a given case; and whether the performance of a particular undertaking would be hostile in an appreciable

degree to a principle of public law, may present a question of difficulty. The laws enacted to enforce care and attention in the management of railways, and the engines and carriages by which such immense numbers of people are conveyed, are intended to subserve a policy which looks to the security of the community; and I think we can not err in holding that any contract, the tendency of which is to impair the efficiency of such laws, is illegal within the principle which has been mentioned.

"I have looked carefully at the cases respecting the ability of common carriers to limit their responsibility by special contract, or by general notice brought home to the owner of the goods. It was once supposed to be settled in this State that an agreement that the carrier should not be responsible according to the common law would be void, as being against public policy;[75] but the point was reconsidered and the question settled the other way.[76] We adhere, however, to the rule that the carrier can not avoid liability by giving notice to that effect, even though it be brought home to the party sending forward the goods. In thus holding, we assume that such contracts are to a certain extent hostile to sound public policy; for we reject evidence which would be competent to prove an agreement in any other case. But these decisions do not relate to carriage on railroads, nor do they concern the transportation of passengers. As to the carriage of property, the English courts, it must be conceded, do hold that railroad companies may by special contract avoid responsibility for negligence of their own servants, though of the degree called gross negligence. It is not necessary to determine whether we should decide in accordance with that doctrine; for there is a manifest distinction between the case of property and that of persons. As to the former the carrier is an insurer against all accidents, except in two well known cases, and may often be held liable without any actual fault on his own part or on

[75] Gould v. Hill, 2 Hill, 623 (1842).

[76] Dorr v. New Jersey Steam Nav. Co., 4 Sandf. 136 (1850).

that of his servants; while a carrier of passengers can only be made responsible for actual negligence of himself or of those for whose acts and omissions he is responsible. It is quite consistent to allow one who, in the absence of a contract, is a general and almost a universal insurer, to qualify his liability by an agreement with the other party, and still to hold that where the law for the better protection of life and member has attached a certain consequence to actual negligence the parties can not by convention dispense with so salutary a rule."

These cases above — to which more than ordinary space has been given on account of the thorough discussion which the subject received from a number of judges — show that the rule in New York is now established that a contract between a passenger and a carrier that in consideration of an abatement in whole or in part of the legal fare, the latter will take upon himself the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable, is valid and not contrary to the policy of that State.[77] This is not, as we have already pointed out, the American doctrine; and it is unnecessary for us here to repeat what we have shown in another place, that it is a rule both impolitic and unjust.[78] Its evils have been judicially acknowledged in the very State where it was adopted after so long a struggle. "The fruits of this rule," says DAVIS, J., of the New York Court of Appeals,[79] "are already being gathered in increasing accidents through the decreasing care and vigilance on the part of these corporations, and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."

[77] Cases cited *ante* in this section and followed in Boswell v. Hudson River R. Co., 5 Bosw. 699; *s. c.*, 10 Abb. Pr. 443 (1860); Stinson v. New York Cent. R. Co., 32 N. Y. 333 (1865), and Poucher v. New York Cent. R. Co., 49 N. Y. 263 (1872).

[78] *Ante* Cap. III.

[79] Stinson v. New York Cent. R. Co., 32 N. Y. 333 (1865).

§ 221. *Presumption from Possession of Free Pass.*— One having a free pass in his possession is presumed to be traveling on it even though it was his intention to pay his fare. In an Irish case of some novelty where this question was presented,[80] the plaintiff lived in a house in Monkstown which he had built and in consideration whereof he was given a free pass by the defendants from there to Passage and back, subject to conditions exempting them from liability. With the intention of going to Queenstown a point beyond Monkstown and of paying his fare between those places, he went on board one of the company's steamers at Passage. He had previously, on the same day, traveled on the pass from Monkstown to Passage, whence he was then returning. The amount of fare from Passage to Queenstown was the same as from Monkstown to Queenstown. The fares of passengers were to be paid on board the steamer, and might be paid at any time during the passage. The intention of the plaintiff to go on to Queenstown, he communicated to a companion but not to the defendants. Before the steamer reached Monkstown he accidentally placed his foot in a hole in the deck and was injured, in consequence of which he did not complete his journey to Queenstown but was obliged to get of at Monkstown. On the trial the plaintiff obtained a verdict for £500 which was reversed by the court of Common Pleas on appeal. LAWSON, J.: "I think this case is free from all doubt that this gentleman, on the day of the accident, used his free pass, and that instead of paying his fare he traveled for nothing. Then, it has been said that by reason of his having formed an intention in his mind to go on further, he became a passenger for hire. He altered that intention — he never took a ticket, and got out at Monkstown. In my opinion there was nothing to go to the jury to show that he was not traveling on his free pass. The verdict must be entered up for the defendants." MORRIS, J.: "I am also of opinion that the verdict must be entered up for the defendants. I do not offer any opinion

[80] Neville v. Cork &c., R. Co., 9 Ir. L. J. Rep. 69, 2 Cent. L. J. 366 (1875).

on the other questions which might arise in the case — namely, as to negligence. If the plaintiff had shown that he had gone into the vessel as a passenger from Passage to Queenstown, that might be sufficient evidence to show that he was a passenger for hire; but the moment it was disclosed that he had a free pass or a license, the *onus* was cast upon him to show that although he had a license enabling him to go that portion of the journey on which this accident happened, and exempting the company from liability for damages, he was traveling otherwise than in right of that license. This accident happens while he is between Passage and Monkstown. Now, the *onus* being thrown upon him of showing that he was not then using this license — how does he do that? By showing that in his own mind he intended to go on to Queenstown. He does not tell that to the defendants. They must have supposed that he was traveling on the pass, because it entitled him to go to Monkstown. How were the company to conceive that he was not using his pass? There must be a mutuality of contract. And though this free pass might be determined by word of mouth, it was not determined. I rest my judgment upon the simple ground that the account given by the plaintiff has failed to show that he was a passenger for hire. I believe that the gentleman did intend to go on to Queenstown; but at the time the accident occurred, he was not between Monkstown and Queenstown." KEOGH, J.: "I am of the same opinion. The condition on which the free pass was given was that the company should not be liable in respect of personal injury to the passenger using it. It is a license to go to Cork from Monkstown; the plaintiff availed himself of that license, and in order to change his position the *onus* lay upon him to prove that he had assumed a different position. There is no evidence that he ever communicated his intention to any one, except to a companion who was traveling with him. I am, therefore, of opinion that this verdict should be entered up for the defendants." MONAHAN, C. J.: "I am of the same opinion. It appears from this free

pass that this gentleman was permitted to travel from Cork to Monkstown; when he entered the vessel, it must be assumed that he was traveling on it; for he never intimated to the company that he was going further. There was no case whatever to go to the jury, and the verdict must be entered for the defendants."

§ 222. *Criminal Liability.* — In a Massachusetts case where one traveled on a railroad under a contract with the company, which permitted him to sell popped-corn on the road to passengers, a privilege for which he paid a certain sum of money annually, and held a season ticket which was endorsed as follows: "The corporation assumes no liability for any personal injury received while in a train to any season ticket holder," and he was killed by a collision of the train in which he was traveling with a hand-car belonging to the company, it was held that the conditions printed on the back of the ticket could not have the effect to relieve the company from its legal liability under a penal statute for gross negligence and carelessness.[81]

[81] Cowan v. Vermont R. Co., 108 Mass. 101 (1871).

CHAPTER X.

POWERS AND LIABILITIES OF AGENTS.

SECTION.

223. Power of Agent of Owner to Contract With Carrier.
224. Who are Within this Rule.
225. Carrier Need Not Examine Authority.
226. Notice to Principal.
227. Carriers' Knowledge of Agent's Want of Authority.
228. Liability of Agent to Principal.
229. Power of Agent of Carrier to Make Contracts.
230. Who are Within this Rule.
231. When Carrier Not Bound.
232. Acts of Agent When Not Binding.
233. Express, Forwarding and Dispatch Companies.

§ 223. *Power of Agent of Owner to Contract With Carrier.*—It may be said generally that authority given to an agent to ship property carries with it authority to accept a bill of lading, or to make a contract containing exemptions from liability.[1] Thus, where the owner of live stock places

[1] Moriarty v. Harnden's Ex., 1 Daly, 227 (1862); Christenson v. American Ex. Co., 15 Minn. 270 (1870); Shelton v. Merchants' Dispatch Trans. Co., 36 N. Y. (S. C.) 527 (1873); *s. c.* 59 N. Y. 258 (1874); Robinson v. Merchants' Dispatch Trans. Co., 45 Iowa, 470 (1877); Meyer v. Harnden's Ex. Co., 24 How. Pr. 290 (1862); Bean v. Green, 12 Me. 422 (1835); Fillebrown v. Grand Trunk R. Co., 55 Me. 462 (1867); Levy v. Southern Ex. Co., 4 S. C. 234 (1872). "That the plaintiff herself never read the paper [a bill of lading containing conditions] is of no moment. The arrangement was made by her agent, who must be presumed to have acquainted himself with the terms of the engagement which the defendant assented to." Steers v. Liverpool Steamship Co., 57 N. Y. 1 (1874).

them in the custody of an agent to be delivered by him to a railroad company for transportation, the agent also having instructions to go with the stock on the train, the agent will have authority to bind his principal as to the terms of the transportation, and the principal will be bound by a contract containing conditions handed to him by the carrier and by him signed with the owner's name.[2] In *New Jersey Steam Navigation Company v. Merchants' Bank*,[3] Harnden, an expressman, had a contract with the navigation company giving him the privilege for a consideration, of transporting the goods which might be intrusted to him in their steamers. The contract exempted the company from certain risks. He was employed by the bank to forward a sum of money which was lost while in the possession of the company. In a suit by the bank against the company, it was held by the Supreme Court of the United States that the bank was bound by the limitation contained in the contract first referred to. The expressman was treated as the agent of the bank.

§ 224. *Who are Within this Rule.*—Where the owner of goods suffers another to deal with them, and such third person makes a contract with a carrier for the transportation of the goods, the carrier supposing the agent to be the true owner, the latter can not afterwards avoid the contract by denying the authority of his agent to make such a contract.[4] The consignor is regarded as the agent of the consignee for the purpose of entering into contracts for their carriage,[5] and, in like manner, a notice given to the vendor is equivalent to a notice to the vendee who directed the goods to be sent.[6] In Redfield on Carriers it is said: "As a general rule the agent to whom the owner in-

[2] Squire v. New York Cent. R. Co., 98 Mass. 239 (1867).

[3] 6 How. 344 (1848).

[4] York Company v. Central Railroad, 3 Wall. 107 (1865).

[5] Robinson v. Merchants' Dispatch Trans. Co., 45 Iowa, 470 (1877); Christenson v. American Ex. Co., 15 Minn. 270 (1870).

[6] Maving v. Todd, 1 Stark. 72, 4 Camp. 225 (1815).

trusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter, or cabman or mere servant, but the consignor of the goods or any other agent who purchases or procures them for him."[7] It has been expressly held in Alabama that a drayman has no authority to make a contract for the consignor limiting the liability of the carrier,[8] though a contrary ruling is to be found in a later decision in Iowa.[9] In *Nelson v. Hudson River Railroad Company*,[10] decided by the New York Court of Appeals in 1872, A having bought a large mirror from B, directed him to forward it on a designated railroad. B sent the mirror by a cartman to the railroad depot for shipment. The company required the cartman to sign a written contract as agent for the shipper, relieving them from all liability for breakage. The contract also contained a clause requiring any objection to the contract to be notified to the company before the property was shipped, in order that a new contract might be made. The cartman also agreed that the mirror should be detained at the depot until the next day, and should be then returned to the shipper if requested. The cartman made known these facts to B, and gave him a duplicate of the contract. On the next day, no notice of dissent from the contract having been given to the railroad company, the mirror was forwarded. It was held that A was bound by the conditions. But it was expressly said in this case that the cartman had no authority to make the contract—the subsequent ratification of his act by B not expressing any objection as to its terms being the ground on which the decision was placed. In *Buckland v. Adams Express Company*,[11] decided by the Supreme Judicial Court of Massachusetts in 1867, the plaintiff had bought a case of pistols from a

[7] Redfield on Carriers, § 52.
[8] Southern Ex. Co. v. Armstead, 50 Ala. 350 (1873).
[9] Robinson v. Merchants' Dispatch Trans. Co., 45 Ia. 470 (1877).
[10] 48 N. Y. 498 (1872).
[11] 97 Mass. 124.

manufacturing company, which were sent by express by the company, the pistols being delivered to the express company by a workman in the manufactory, who received from the latter company a receipt limiting its liability. It was held that the plaintiffs were not bound by the receipt, as they had given no authority to the workman to enter into any such contract; and that the fact that the same workman had taken like receipts for shipments of goods previously made by the plaintiffs, and that one of the plaintiffs had charge of these receipts, would not bind the plaintiffs to the restrictions in the receipt in question; the workman having frequently also sent goods for the plaintiffs without any receipt or special contract of any kind.

§ 225. *Carrier Need Not Examine Authority.*— A carrier receiving goods for carriage will not be required to examine the authority of the person presenting them to make a contract limiting his responsibility.[12] It is said in a New York case that to hold that where goods are delivered the carrier who chooses to limit his liability should be compelled to stop and examine the authority of the person presenting the goods to make the contract, would virtually destroy the carrying business.[13] Where one contracted to pay a certain price for cars to carry four hundred cattle, and delivered a part, signing a contract restricting the liability of the company, it was considered proper to presume that other persons who delivered the remainder of the cattle acted as his agents, and had authority to sign similar contracts.[14]

§ 226. *Notice to Principal.*— Notice to the principal is notice to all his agents.[15] Thus in *Baldwin v. Collins*,[16] it was said: "The counsel insists that as the agent or clerk who was charged with packing the goods and shipping them was not aware of the regulation of the defendant, his

[12] Moriarty v. Harnden's Express, 1 Daly, 227 (1862).
[13] Meyer v. Harnden's Express Co., 24 How. Pr. 290 (1862).
[14] Illinois Cent. R. Co. v. Morrison, 19 Ill. 136 (1857).
[15] Mayhew v. Eames, 3 B. & C. 601, 1 C. & P. 550 (1825).
[16] 9 Rob. 468 (1845).

client ought to recover, although his employer might have known it. We think otherwise. If the principal was aware of the rule, his client or agent being kept ignorant of it can not excuse him; and so if the agent knew it and the principal did not, still the agent would be bound to comply with it, and his failure would operate upon his employer."

§ 227. *Carrier's Knowledge of Agent's Want of Authority.*— Knowledge on the part of the carrier that the agent was without authority to enter into any contract would of course alter the rule just stated; as where the owner has given the carrier instructions to forward immediately goods which are to be delivered by a cartman, and the latter at the time of delivery without authority from the owner gives contrary directions, the owner is not bound by such directions.[17] The case of *The Pacific*[18] is another example of this exception. There the drayman of the shipper took a bill of lading containing the words "not accountable for contents," and informed the shipper of that fact. The latter expressed his disapprobation of the qualification at once to the drayman, but did not reclaim the goods. The drayman communicated the dissatisfaction of his employer to the clerk of the carrier while the goods were lying on the wharf. It was held that the liability of the carrier was not qualified by the agreement.

§ 228. *Liability of Agent to Principal.*— It seems that an agent intrusted with goods for the purpose of having them forwarded to their destination is so far authorized to enter into contracts with the carrier by whom they are to be sent that he will be responsible for any damage which they may receive on account of his refusal to deliver them to the carrier under a contract containing reasonable conditions in limitation of his responsibility. In *Rawson v. Holland*,[19] for example, the defendant, an express company,

[17] Moses v. Boston &c. R. Co., 24 N. H. 71 (1851).

[18] 1 Deady, 17 (1861).

[19] 59 N. Y. 611 (1875); see Bancroft v. Merchants Dispatch Trans. Co., 47 Iowa, 262 (1877).

accepted goods to be transported beyond its line, but refused to deliver them to a connecting carrier at the end of its route, because the latter would only take the goods under a contract limiting its common law liability. The express company thereupon stored the goods in its warehouse where they were destroyed by fire. The defendant was held responsible for the loss. But in *Gordon v. Ward*,[20] one W, residing in Michigan, ordered a bale of tobacco from G, a merchant in Ohio, directing it to be sent by rail, and giving as a reason for this that the railroad company would be liable for all risks. G sent the tobacco by rail, but took from the company a bill of lading exempting them from liability for loss by fire. The tobacco while in transit was destroyed by fire. In a suit by G for the price of the tobacco he was held entitled to recover. This decision is based upon the ground that there was nothing to show that the railroad company was under the obligations attaching to common carriers or that it was within the power of the defendant to have required the shipment on any other terms than he did.

§ 229. *Power of Agent of Carrier to Make Contracts.*— In cases where the liability of the carrier has been limited by a contract made by one representing himself as his agent for that purpose, the authority of such agent is an immaterial question, in a suit against the carrier in which the contract is set up as a defense, for the reason that the act of the agent even if unauthorized may be taken advantage of by the carrier by a subsequent ratification. But where the agent has attempted to bind the carrier to some new or extraordinary responsibility or to duties not generally assumed by him, the power of the agent becomes a question of considerable importance. As common carriers, especially at the present day, transact the greater part if not all of their business with the public through agents and servants, it is plain that the public have a right to assume that they are authorized to do whatever they attempt to do. In *Wink-*

[20] 16 Mich. 360 (1868).

field v. Packington,[21] the defendant being informed by the plaintiff's servants that his goods would be carried at a certain rate delivered them on the faith of this statement to him. The printed rates of the plaintiff being much higher he brought an action for the larger sum. Lord TENTERDEN, C. J., said: "If a person goes to the office of a carrier and asks what a thing will be done for, and he is told by a clerk or servant who is transacting the business that it will be done for a certain sum, the master can charge no more." *Denman*, of counsel for the plaintiff, having submitted that it being contrary to his orders the clerk had no right to agree that the trees should be carried at a rate lower than that expressed in the printed tariff, the chief justice refused to follow this argument but ordered judgment for the plaintiff, saying that if men were not bound by such bargains business could not go on. It is well established in this country that a contract for the carriage of goods made with the authorized agent of the carrier is to be regarded as made with the carrier himself.[22] Thus where an express company, by a clerk other than one whose regular duty was to make such contracts, agreed to ship goods by a specified vessel not its own, but sent them by another vessel which with the goods was lost at sea, it was held that the general nature of the company's business requiring that the duties assigned to a clerk should sometimes be performed by another clerk, the act of the substituted clerk, if within the general scope of his duty, was the act of the principal.[23] Where the name of the agent of the carrier is printed in a bill of lading which contracts for the delivery of the goods at the end of his line, the agent has authority to contract for the carriage of the goods beyond and over another line.[24]

[21] 2 C. & P. 599 (1827).

[22] Myall v. Boston &c. R. Co., 19 N. H. 122 (1848); Reynolds v. Toppan, 15 Mass. 370 (1819).

[23] Goodrich v. Thompson, 4 Rob. (N. Y.) 75 (1866), affirmed 44 N. Y. 324 (1871); Goddard v. Mallory, 52 Barb. 87 (1868).

[24] Baltimore &c. Steamboat Co. v. Brown, 54 Pa. St. 77 (1868).

§ 230. *Who are Within this Rule.*—In England it is held that a station agent may bind the carrier by a contract beyond its legal duties and in conflict with its regulations; he may agree to carry to a place or at a time other than the rules of the company permit.[25] The same rule is applied in this country. In Wisconsin it has been held that the station agent of a railroad company may bind the company to a contract to deliver goods beyond its line and within a certain time,[26] and in a New Hampshire case [27] where one had agreed to deliver goods by a certain day and the station agent of a railroad company having knowledge of this contracted that they should be so delivered, the company was made liable for the damages caused by their non-delivery at that time. It has been ruled, however, in the same State in another case that such an agent has no authority to bind his principal by a contract to carry freight by a passenger train.[28] In Pennsylvania where at the request of the owner of a freight car the agents of a railroad company attached his car to a passenger train contrary to the instructions and rules of the company, he agreeing to run all risks, it was held that the company would still be liable for an injury caused by the negligence of their servants or agents.[29] The agent of a railroad company for the sale of tickets has authority to make a contract with a passenger which is at variance with the printed conditions of the ticket;[30] but in the absence of evidence the presumption is that a ticket agent at a way station has no authority to change or modify contracts between the company and its through passengers.[31]

§ 231. *When Carrier Not Bound.*— In a Massachusetts case it was decided that a station agent of a railroad com-

[25] Pickford v. Grand Junction R. Co., 12 M. & W. 766 (1844); Wilson v. York &c. R. Co., 18 Eng. L. & Eq. 557 (1851).

[26] Strohn v. Detroit &c. R. Co., 23 Wis. 126 (1868).

[27] Deming v. Grand Trunk R. Co., 48 N. H. 455 (1869).

[28] Elkins v. Boston &c. R. Co., 23 N. H. 275 (1851).

[29] Lackawanna &c. R. Co. v. Chenewith, 52 Pa. St. 382 (1866).

[30] Burnham v. Grand Trunk R. Co., 63 Me. 298 (1873).

[31] McClure v. Philadelphia &c. R. Co., 34 Md. 532 (1871).

pany has no authority to bind the company as common carriers beyond the line of its own road, by signing receipts furnished in blank by the shipper, by the terms of which the company undertakes to forward and deliver the goods to the order of the consignee at points on a connecting line, where it appears that such agent acted without special authority and without the knowledge of the company, and that the officers of the company had furnished the agent with blank forms of receipts to be given for goods shipped beyond their own line, by which it was provided that in case of loss or damage of the goods the company only should be answerable in whose actual custody the goods should be at the time of the loss.[32] In *Slim v. Great Northern Railway Company*,[33] the regular practice in respect to the receipt and carriage of goods and cattle on a railway was that the cattle were taken to a porter appointed for the purpose, who received them and gave the sender a consignment note for them, which was signed by him and the sender, and contained a notice respecting the receipt, carriage and delivery of the goods; that the company would not be accountable for any articles unless signed for as received by their clerks or agents. The consignment note was taken to the goods clerk, who made out from it a cattle ticket, which was signed by him and the sender, and handed to the latter as his voucher for the delivery of the cattle at their destination. Carriage was generally but not always prepaid. The plaintiff being well acquainted with this practice, booked some pigs in the regular way at one of the company's stations, and while they were waiting there he sent six other pigs by L, who had also some of his own. L booked his own regularly, and told the proper porter that the six were the plaintiff's and were to go with his others. The porter replied that he would take care of them, and put them with the others. No consignment note or cattle ticket was signed or received for them. It was held in an action

[32] Burroughs v. Norwich &c. R. Co., 100 Mass. 26 (1868).

[33] 14 C. B. 647; 2 C. L. R. 864; 18 Jur. 1119; 23 L. J., C. P. 166 (1854).

against the company for the non-delivery of the pigs, charging them with having received them to be carried for hire, that the company was not liable, as there was no evidence of any authority from the company to the porter or of his having held himself out as having authority to receive or contract for the carriage of the pigs in any other than the usual manner.

§ 232. *Acts of Agent When Not Binding.*— In *Macklin v. Waterhouse*[34] it was ruled that the carrier's agent telling the female servant of the owner of a parcel above the value of £5 that it ought to be insured was not a sufficient notice of the limitation of the carrier's responsibility. So in a case in this country where the agent of a railroad gave a receipt containing an exception against fire, and the person to whom it was given said that he did not like that clause, and the agent told him that it did not matter, that the carriers were liable notwithstanding what they wrote in that way, it was held that the exception was good. It appeared that the agent was only expressing his opinion of the law, as to which he was mistaken, and that the owner of the goods knew that the agent had no authority to contract for sending them without an agreement containing the exception against fire.[35]

§ 233. *Express, Forwarding and Dispatch Companies.*— It has been attempted on the part of express, forwarding and dispatch companies to evade the responsibilities of common carriers, on the ground that they are not the owners of the vehicles employed in the transportation; but this pretense has not been permitted in the courts. The names which they assume are regarded as immaterial; the duties which they undertake being the criterion of their liability. They are, therefore, held to the responsibility of common carriers, both where they are and where they are not interested in the conveyances by which the goods are trans-

[34] 5 Bing. 212, 2 M. & P. 319 (1828).

[35] Pemberton Co. v. New York, &c. R. Co., 104 Mass. 144 (1870).

ported.[36] If an express company engaged to transport goods sends them by a railroad company employed by it to perform the service, the railroad company becomes the agent

[36] "There are considerations justifying a strict application of the law of common carriers to express companies. They profess to employ trusty agents, who are charged with the safe custody and speedy transit and delivery of all packages put in their charge. The effect of these inducements is in some measure to supersede the forwarding merchant and to limit the liability of railroad and steamboat companies, who may be as faithful, and are certainly as responsible agents. If they shall by the promise of decided advantages over the usual modes of transportation secure most of the business generally intrusted to common carriers the public is concerned that they should be held to a rigid fulfillment of the promise. They can not attain a greater speed than the railroad or steamboat which conveys them, and there is no proof that they are in other respects more trustworthy. The only advantage which in truth they can offer is the safer custody and more certain delivery of the goods to the consignee without storage. These temptations may induce the public to employ them at an increased rate, and they have no reason to complain of an exact application of the rule of law which enforces the responsibility which they voluntarily assume. We should be regardless of the great interests daily committed by the public to the express companies with a confidence induced by their tempting offers if their liability for the safe carriage and delivery is not vigorously enforced." Stadhecker v. Combs, 9 Rich. 193 (1856). "The name or style under which they assume to carry is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying and delivering goods, wares and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire control of it, transport it from place to place and deliver it at a point of destination to some consignee or agent there authorized to receive it. But it is urged on behalf of the defendants that they ought not to be held to the strict liability of a common carrier, for the reason that the contract of carriage is essentially modified by the peculiar mode in which defendants undertake the performance of the service. The main ground on which this argument rests is that persons exercising the employment of express carriers or messengers over railroads and by steamboats can not, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed and the agents or servants by whom they are selected, are not managed by them nor subject to their direction or supervision, and that the rules

of the express company, and the latter is liable to the consignor for its acts.[37] In *Hersfield v. Adams*,[38] expressmen

of the common law regulating the duties and liabilities of common carriers having been adapted to a different mode of conducting business by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight over them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed in part at least by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made or by the servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are to be carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that the loss had happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor." Buckland v. Adams Express Co., 97 Mass. 124 (1867), and see Christenson v. American Express Co., 15 Minn. 270 (1870); Lowell Wire Fence Co. v. Sargent, 8 Allen, 189 (1864); Sherman v. Wells, 28 Barb. 403 (1858); Baldwin v. American Express Co., 23 Ill. 197 (1859); Read v. Spaulding, 5 Bosw. 395 (1859); Haslam v. Adams Express Co., 6 Bosw. 235 (1860); Sweet v. Barney, 23 N. Y. 335 (1861); Verner v. Sweitzer, 32 Pa. St. 208 (1858); Southern Express Co. v. Newby, 36 Ga. 635 (1867).

[37] Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 4 Cent. L. J. 35 (1876), reversing *s. c.*, 1 Cent. L. J. 436 (1874); Boskowitz v. Adams Express Co., 5 Cent. L. J. 58 (1887), *s. c.*, 9 Cent. L. J. 389 (1879).

[38] 19 Barb. 577 (1855).

engaged in forwarding goods from New York to California by others' boats and vessels, received two trunks of goods to be transported, contracting to be liable for no loss except from the fraud or gross negligence of themselves or their servants, and the goods were injured by the sinking of a boat in the Chagres river, and examined by surveyors and sold at auction. The Supreme Court of New York held that the expressmen were not liable for damages previous to the sinking of the boat, and were not guilty of gross negligence in not forwarding the damaged goods to California, the captain of the boat as a common carrier having control of the goods when in his possession. So far as this case assumes that the defendants were not common carriers it is in conflict with the authorities and has been criticized and condemned in the State where it was decided.[39] In *Read v. Spaulding*, a subsequent New York case,[40] a person doing business under the style of "Spaulding's Express Freight Line," received goods to be forwarded to the place named, and in the bill of lading it was provided that all property "will be delivered at the depots of the company or steamboat landing," and that no liability for deficiency in the packages should exist "if the goods were delivered at the depot in good order;" and by the stipulations in regard to freight it appeared that compensation was to be made to the defendant for transportation over the whole line. It was held that such party so contracting was a common carrier, and not a forwarder merely. So in a California case a receipt given by an express company was in this form: "In no event to be liable beyond our route as herein receipted. It is further agreed and is part of the consideration of this contract that W. F. & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified in this re-

[39] Place v. Union Express Co., 2 Hilt. 19 (1858); Read v. Spaulding, 5 Bosw. 395 (1859), *s. c.*, 30 N. Y. 630 (1864).

[40] 5 Bosw. 395 (1859), affirmed 30 N. Y. 630 (1864).

ceipt." It was not the true construction of the receipt that the express company should be discharged from liability for loss caused by the negligence of the officers of a vessel employed by the express company to transport the goods named in the receipt.[41] But the case of *Bank of Kentucky v. Adams Express Company*,[42] is a recent and conclusive adjudication on this point. The defendants and the Southern Express Company were associated in carrying by the railroads through Louisiana and Mississippi to Humboldt, Tenn., and thence over the Louisville and Nashville Railroad to Louisville, Ky., under a contract by which they divided the compensation in proportion to the distance the article was transported by each respectively. Between Humboldt, Tenn. and Louisville, Ky., both companies employed the same messenger, but this messenger, south of the northern boundary of the State of Tennessee, was subject entirely to the orders of the Southern Express Company and north of that boundary was subject entirely to the orders of the Adams Express Company. On the 26th of July, 1867, the Southern Express Company received from the Louisiana National Bank at New Orleans two packages, one containing $13,528.15 for delivery to the Bank of Kentucky at Louisville, and the other containing $3000 for delivery to the Planters' National Bank at Louisville. The receipt which provided that its conditions should inure to the benefit of any succeeding carrier released the company from liability for any loss or damage occasioned by fire. The packages were transported to Humboldt and there delivered to the messenger of the defendants, who placed them in an iron safe which was deposited in a car of the railroad. Before reaching Louisville the train was thrown from the track, the express car caught fire, and the money was destroyed. On the trial the circuit judge, BALLARD, J., instructed the jury that the negligence of the servants of the railroad was not ma-

[41] Hooper v. Wells, 27 Cal. 11 (1864).

[42] 93 U. S. 174, 4 Cent. L. J. 35 (1876).

terial; that if the packages were destroyed by fire without any fault of the defendants' messenger, the case was brought within the exception of the bill of lading, and the defendants were not liable.[43] The Supreme Court of the United States before which the case was subsequently brought were of a different opinion. "With this ruling," said Mr. Justice STRONG, "we are unable to concur. The railroad company in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody, either of the express company or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants, a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them nor had they any control over the railroad company or its employees. It is true the defendants had also no control over the company or its servants; but they were its employers, presumably they paid for its service, and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency; but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it."

[43] 1 Cent. L. J. 436 (1874).

CHAPTER XI.

CONNECTING CARRIERS.

SECTION.

234. Carriage Beyond Carrier's Route.
235. Power to Contract to Carry Beyond His Route.
236. Right to Limit His Responsibility to His Own Route.
237. But Still Liable in Some Cases.
238. What Evidence of Contract for Through Transportation.
239. The English Doctrine.
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241. Which Carrier May be Sued.
242. Construction of Special Contracts.
243. When Connecting Carrier May Claim Exemptions in First Contract,
244. When Exceptions in Contract With First Carrier do Not Enure to Connecting Carrier.

§ 234. *Carriage Beyond Carrier's Route.*— In the transportation of goods even to points not far distant it is not always possible to have the duty performed by only one carrier. The first carrier is frequently able to perform the service but in part, and is forced to rely upon others in the same business and whose lines extend beyond his own to complete the carriage which he has commenced. The line of a railroad company extends from A to B. At B another road begins which extends to C. A shipper at A desires to have goods sent to C and delivers them to the company whose line commences at A, for that purpose. It is obvious that the latter in entering into this contract may incur two liabilities at its option — it may bind itself to carry the

goods to C employing the second company as its agent to perform the service from B to C, or it may agree simply to do what it is bound to do, carry them to B, and at that point, as the agent of the shipper, deliver them to the second road to be carried to their destination. There being then this option it has become a question of much interest and one upon which there has been considerable discussion, whether under the circumstances of particular cases, a carrier should be held responsible for the goods intrusted to him during the whole transportation or until they are delivered at their final destination, although this be a point beyond the limits of his route, or whether on the other hand, having shown that he had placed them in good order in the hands of a connecting carrier, his responsibility should be considered as terminating at that point.

§ 235. *Power to Contract to Carry Beyond his Route.*— A common carrier has power to make a contract to carry to a place beyond the terminus of his route and to render himself liable as such for the whole distance. All connecting carriers in such case become his agents for whose negligences or other defaults he is responsible, and he has no more power to evade by contract the consequences of their negligence than he can the results of his own. It is also well settled that the contract of a corporation to carry beyond its own line is not *ultra vires*. It may accept goods to be delivered not only at a place outside the limits within which it is chartered to do business but even outside the State or country of its creation.[1] Such an undertaking may be

[1] Redfield on Carriers §§ 190-197; Brice on *Ultra Vires* (Green's ed). App. III. p. 673. There is so little dissent from this doctrine that I have thought it unnecessary to cite the cases which declare it, all of which may be found in the two text books above. The single exception to this array of authority is the Connecticut case of Hood v. New York &c. R. Co. 22 Conn. 502 (1853) of which Mr. Redfield says: "The case is not attempted to be maintained upon the basis of authority but upon just principles, showing therefrom the innate want of authority in the company. It must be admitted the reasoning is specious; so plausable indeed that if the matter were altogether *res integra*, it might be deemed sound."

established by express contract or by evidence that the carrier held himself out as a common carrier for the entire distance, or other circumstances indicating an understanding that the contract was for through transportation.[2] Where a carrier has contracted for the carrying of goods over another line beyond his route a stipulation that his responsibility is to terminate at the end of his own line will be of no effect.[3]

§ 236. *Right to Limit his Responsibility to his own Route.*— But the law does not require a common carrier to transport beyond his own line, and he may, therefore, stipulate that he shall not be liable for any loss or damage except such as may occur on his own route — in other words he may undertake simply to deliver the goods to the connecting carrier — in which event his liability will cease with such delivery, he having done all either the law or his agreement requires him to do.[4]

[2] Root v. Great Western R. Co., 45 N. Y. 524 (1871).

[3] Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221 (1869); Condict v. Grand Trunk R. Co., 54 N. Y. 500 (1873).

[4] Railroad Co. v. Androscoggin Mills, 22 Wall. 594 (1874); Railroad Co. v. Pratt, 22 Id. 123 (1874); Mulligan v. Illinois R. Co., 36 Iowa, 180 (1873); Babcock v. Lake Shore R. Co., 49 N. Y. 491 (1872); *s. c.* 43 How. Pr. 317 (1872); Ætna Ins. Co. v. Wheeler, Id. 616 (1872); American Express Co. v. Second National Bank, 69 Pa. St. 394 (1871); Reed v. United States Express Co., 48 N. Y. 462 (1872); Lamb v. Camden R. Co., 46 Id. 271 (1871); Hall v. North Eastern R. Co., L. R. 10 Q. B. 437 (1875); Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88 (870); Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221 (1869); Burroughs v. Norwich R. Co., 100 Mass. 26 (1868); Hinkley v. New York Cent. R. Co., 3 T. & C. 281 (1874); St. Louis &c. R. Co. v. Piper, 13 Kas. 505 (1874); Aldridge v. Great Western R. Co., 15 C. B. (N. S.) 582 (1864); Fowles v. Great Western R. Co., 7 Exch. 699 (1852); Kent v. Midland R. Co., L. R. 10 Q. B. 1 (1874); Martin v. American Express Co., 19 Wis. 336 (1865); Oakey v. Gordon, 7 La. Ann. 235 (1852); Sullivan v. Thompson, 99 Mass. 259 (1868); Witbeck v. Holland, 55 Barb. 443 (1870); Pendergast v. Adams Express Co., 101 Mass. 120 (1869); Pemberton Co. v. New York R. Co., 104 Id. 144 (1870); Wahl v. Holt, 26 Wis. 703 (1870); Moriarty v. Harnden's Express, 1 Daly, 227 (1862); United States Ex. Co. v. Rush, 24 Ind. 403 (1865); Chicago &c. R. Co. v. Montfort, 60 Ill. 175 (1871); Maghee v. Camden R. Co., 45 N. Y. 514 (1871); St. John v. Express Co., 1 Woods, 615 (1871); Ricketts v. Baltimore &c. R. Co., 4 Lans. 446 (1871); *s. c.*, 61 Barb. 18 (1871); Camden &c. R. Co. v.

§ 237. *But Still Liable in Some Cases.*—But although where a common carrier receives goods under an agreement which absolves him from all responsibility for loss or damage occurring beyond the end of his own route, the liability of the carrier terminates when he has delivered the goods into the custody of the next carrier on the line,[5] his liability will not be terminated by placing the goods carried in a depot used by him and a connecting road in common; but it must be shown that they were placed on the platform of the connecting company, or had been in some manner given over to it.[6] He will still be liable for negligence for failing to deliver the goods to the connecting carrier with reasonable dispatch,[7] and likewise for any injury which occurs beyond his route through his own neglect, as by furnishing defective cars.[8]

§ 238. *What Evidence of Contract for Through Carriage.*—The English judges, and a majority of the American courts, differ on the question as to what is to be considered sufficient to constitute a contract by a common carrier to transport property entrusted to him to its destination, when that point is beyond his route. On the one hand, it is said that where a carrier receives goods directed to a place beyond his line he, by the very act of acceptance, engages to deliver it at its destination, wherever that may be. On the other hand, the acceptance of such a parcel or other property, so directed, is considered to imply nothing more than an agreement on the part of the carrier to transport it to the end of his route and there deliver it to a con-

Forsyth, 61 Pa. St. 81 (1869); Pennsylvania R. Co. v. Schwarzenberger, 45 Pa. St. 208 (1863); Farmers &c. Bank v. Champlain Trans. Co., 23 Vt. 186 (1851); Taylor v. Little Rock &c. R. Co., 32 Ark. 393 (1877); United States Ex. Co. v. Haines, 67 Ill. 137 (1873); Erie R. Co. v. Wilcox, 84 Ill. 239 (1876); Gibson v. American Ex. Co., 1 Hun, 387 (1874).

[5] Fowles v. Great Western R. Co., 7 Exch. 699 (1852); Collins v. Bristol &c. R. Co., 1 H. & N. 517 (1856), and cases cited *ante*, § 236.

[6] Kent v. Midland R. Co., L. R. 10 Q. B. 1 (1874).

[7] Louisville &c. R. Co. v. Campbell, 7 Heisk. 253 (1872); Rawson v. Holland, 59 N. Y. 611 (1875).

[8] Indianapolis &c. R. Co. v. Strain, 81 Ill. 504 (1876).

necting line to complete the carriage. In support of the first doctrine it is argued that a different rule would work great inconvenience. A person delivering his goods to a carrier to be sent to a certain place will generally rely on him alone to perform the service. He can not be supposed to know the particular portion of the transit which the first carrier controls, much less the other owners or proprietors of the continuous line. He intends to make one contract, but not two or three or half a dozen. When he places his property in the hands of the carrier, he at once loses all control over it. If it is not delivered, how is he to discover at what particular portion of the route it was lost? He would be forced to rely on the statements of the carriers themselves, who would be little likely to aid him in his search. If he did succeed in fixing the responsibility, he might find himself obliged to assert his claim against a party hundreds of miles away, and under circumstances which might well discourage a prudent man and induce him to bear his loss rather than incur the expense and trouble of pursuing his remedy against so distant a defendant.[9] The

[9] "If the goods were to be carried only in the narrow sense contended for by the defendants then if the place of their destination were but three miles beyond Preston and they were lost on the other side of the railway terminus, the defendants are not to be liable, but the plaintiff is to find out somebody or other who is to be liable in respect of the carriage of those three miles." Gurney, B., in Muschamp v. Lancaster &c. R. Co., 8 M. & W. 421 (1841). "As to the case which has been put of a passenger injured on a line of railway beyond that where he was originally booked, I suppose that it is put as a *reductio ad absurdam*, but I do not see the absurdity. If I book my place at Euston Square and pay to be carried to York and am injured by the negligence of somebody between Euston Square and York, I do not know why I am not to have my remedy against the party who so contracted to carry me to York. But at all events in the case of a parcel any other construction would open the door to incalculable inconveniences. You book a parcel, and on its being lost you are told that the carrier is responsible only for one portion of the line of road. What would be the answer of the owner of the goods? I know that I booked the parcel at the Golden Cross for Liverpool and my contract with the carrier was to take it to Liverpool. All convenience is one way and there is no authority the other way." Rolfe, B., in Muschamp v. Lancaster &c. R. Co., *supra*. "A person sending

first carrier, on the contrary, has facilities for tracing the loss not possessed by the public. He is in constant communication with his associates in the business; he has their

goods by a railway can not be supposed to know in the case of a continuous line who are the owners of its different portions. He has a right to suppose when the officers of the company at one extremity receive goods to be delivered at the other extremity either that the whole line belcngs to them or at all events they so represent it and that they contract on that footing." Lord Cranworth, in Directors of Bristol R. Co. v. Collins, 7 H. L. Cas. 194 (1858). "That the defendants were common carriers on their own line of railway is not disputed nor could it be; but it is said that beyond the extent of their own line they are not subject to the liabilities of common carriers because they only undertake to forward, not to carry the goods. I am of opinion that the goods were received by defendants to be carried by them as common carriers from Penzance to Wolverhampton. It would be inconvenient if we were to hold that upon the construction of these facts, the plaintiff was in the situation of a person who did not contract with the defendants beyond the extent of their own line, or who made separate contracts with a number of different carriers between Penzance and Wolverhampton." Channell. B., in Wilby v. West Cornwall R. Co., 2 H. & N. 707 (1858). "The use of steam in carrying goods and passengers has produced a great revolution in the whole businees. The amount and importance of it have of late vastly increased and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines receiving one fare through and dividing it among themselves by mutual agreement. They act together for all practical purposes so far as their own interests are concerned as one united and joint association. In managing and controlling the business on their lines they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits, that happen on any part of their route. If by their agreement each party to the connected line is to make good the losses that happen on his part of the route, the associated carriers and not the owners of the goods have the means of ascertaining where the losses have happened. And if this can not be known there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route. They undertake the business of common carriers and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law which as an elementary maxim holds the common carrier liable for all accidental losses must be applied to these methods of transacting the same business; and there is certainly nothing in the present condition of the business which calls for any relaxation of the old rule.

receipts for the property delivered to them, and with no inconvenience at all could charge the loss to his negligent

The great value of the commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that where goods are once intrusted to carriers on these long routes they are placed beyond all control and supervision of the owner, are cogent reasons for holding those who associate in these connected lines to a rule which shall give effectual and convenient remedy to the owner whose goods have been lost or damaged on any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and whole policy of the common law. What then is the situation of the owner whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier on whose part of the route the damage may have happened? In the first place he must set about learning where his loss happened. This would often be difficult and sometimes impossible. Suppose an invoice of flour shipped in good order at Ogdensburg were found on arrival at Boston to have been damaged somewhere on the route, or suppose a trunk checked at Boston for Chicago was broken open and plundered before it reached Chicago, what would the owner's chance be worth of finding out in what particular part of the route the damage happened? He would have no means of learning himself, and he would not, unless of a very confiding deposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants. * * * A rule which throws such difficulties in the way of the owner who seeks to recover of common carriers for the loss of his goods I can not but regard as a wide departure from the general doctrine of the common law on this subject." Perley, C. J., in Lock Co. v. Railroad, 48 N. H. 338 (1869). "By the law of common carriers their liability was fixed on the receipt of the goods to be carried. * * The receipt of goods by them is all that is necessary to fix this liability, so that if a parcel or package be delivered to a railroad at Chicago marked for Louisville, Ky., or any other place off their route and they receive it to carry, they are bound by this rule of the common law, if the package or parcel be lost, to account to the owner for its value. The contract of the shipper is with the carrier in whose custody he places the goods. * * Now, on the point of public convenience, which consideration had great weight with us in determining which rule should be adopted, it seems to us that the consignors of the productions of our country or other property by

agent. In support of the second doctrine it is simply answered that the extraordinary liabilities of common carriers

railroad should not be required in case of loss or damage to look for renumeration to any other party than the one to which they delivered the goods. It would be a great hardship indeed to compel the consignor of a few barrels of flour delivered to a railroad in this State, marked to New York city and which are lost in the transit, to go to New York or to the intermediate lines of road and spend days and weeks perhaps, in endeavors to find out on what particular road the loss happened, and having ascertained it, on the event of a refusal to adjust the loss, to bring a suit in the courts of New York for his damages. Far more just would it be to hold the company who received the goods in the first instance as the responsible party, and the intermediate roads its agents to carry and deliver, and it is the most reasonable and just, for all railroads have facilities not possessed by a consignor of tracing losses of property conveyed by them and all have or can have running connections with each other. Above all when it is considered that the receiving company can at the outset relieve itself from its common law liability by a special and definite agreement such a rule can not prejudice them." Breese J., in in Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88 (1870). "We feel no disposition to relax the rule of liability on the part of railroads now having almost a monopoly of the transportation of all the products of the industry as well as articles of merchandise, of this great and rapidly developing country. It would seriously incommode the business of the country if when property is shipped by one road and must pass over more than this road in order to reach its destination, the shipper in case of injury to his goods is to inquire how many routes and how many different companies make up the line between the place of shipment and delivery or to determine at his peril which company is liable for the injury." Freeman J., in East Tennessee &c. R. Co. v. Rogers, 6 Heisk. 143 (1871). "It would be exceedingly hard if the shipper of a small but valuable package at Boston should be compelled to trace the package from that point along all the intervening lines over which it might possibly pass in order to reach Tennessee in order to find who was responsible to him for its loss. It is said in argument, however, that the books of each company would show the receipt of the package. That may be and is true no doubt; but then the books are their own and may or may not be exhibited to a single shipper or may not possibly show the truth of the case. At any rate it would not be proper that the shipper should be compelled to rely on the evidence to be furnished by the company sought to be held liable to sustain his right. On the other hand, it imposes no hardship upon the other roads, because they are in constant communication, interchange business, and the books of the company originally shipping would show it was received by the other and would be always in their possession and of ready access. Thus the inconvenience to the road would be much less than to the single shipper of a par-

can not in justice be extended beyond their own routes, where alone they have an opportunity of choosing for themselves their servants, and of guarding the property entrusted to their care.[10]

cel who might never have another transaction with any of the companies during his life." Freeman, J., in Western &c. R. Co. v. McElwee, 6 Sneed, 208 (1871). A statute of Missouri passed last year provides as follows: "Whenever any property is received by a common carrier to be transferred from one place to another within or without this State or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered or over whose line such property may pass, and the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover in a proper action the amount of any loss, damage or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company through whose negligence the loss, damage or injury may be sustained." Rev. Stat. of Missouri, (1879) cap. 14, § 598, p. 95. This provision is eminently just, giving as it does to the shipper a certain remedy for the recovery of his goods and entailing upon the carrier to whom the goods were first delivered no hardship at all.

[10] "The receipt shows nothing more than the naked fact that a box of merchandise marked 'J. Petrie, Little Falls, Herkimer Co.,' was received on board the tow-boat Ontario, from St. John & Tousey. The tow-boat Ontario carried goods between New York and Albany, and it is not pretended that the owners were connected with any line of transportation beyond either of those places. The custom of trade and the nature of the business carried on by the plaintiffs in error tended to explain the purpose of the bailment, and according to the evidence exhibited in this cause would, I think, make them liable as common carriers from New York to Albany, and as forwarders beyond that place. The defendants in error can not be presumed to have been ignorant of the nature of the plaintiffs' business, and that the Ontario carried freight only between New York and Albany. It is not necessary, as suggested by the Supreme Court, that the receipt should have limited the carriage to Albany, because the receipt in itself creates no liability except such as arises from the mere delivery of the box on board of the vessel. The implied contract which the law makes for the parties must be reasonable, and such as is consistent with the plaintiffs' occupation and the usage of trade. If the receipt had been given by a person whose business was to receive goods for storage, the implied contract would be to keep them with ordinary diligence; and the name of a place marked on a box could not

§ 239. *The English Doctrine.* — The first of the two views just mentioned is the English doctrine, first announced in the leading case of *Muschamp v. Lancaster and Preston Junction Railway Company.* There a parcel was delivered to the defendant at Lancaster directed to a person

subject him to the liabilities of a common carrier. In the case before us the receipt raises no special contract. It neither specifies nor imposes any obligation on the party giving it other or different from that which he is under by reason of the nature and ordinary course of his business. No pretense is made here that any special contract was entered into, and the only reasonable contract which the law can imply under the circumstances of this case is that the plaintiffs in error should carry the box to Albany and forward it thence to the place of destination. The rule established by the Supreme Court that the name of a place marked on a box of merchandise implies a contract to deliver at such place without any reference to the nature and extent of the business and employment of the carrier is fraught with consequences most alarming to all who are engaged in freighting and transportation. Suppose the box had been marked 'Brown's Hole, Rocky Mountains.' The Supreme Court say there is an implied contract to deliver the goods at that place. And as it is the duty of every man faithfully to fulfil his contracts, the plaintiff in error must abandon his ordinary avocation and business, leave the delights of domestic association, embark with his dearly bought freight and follow the long lines of internal navigation till he reaches the head waters of the Yellow Stone. Then he must traverse a vast desert with Indian horses and pack saddles, exposed to famine, to the wintry storms, to wild beasts and savages; and if Providence should protect him through every danger he returns after years of suffering a worn out beggar to a ruined home. This may be considered an extreme case; yet I conceive it is no more than carrying out the principle to its legitimate and certain results. At the same time this receipt was given another receipt was given for a box of merchandise marked 'G. S. Hubbard, Chicago, Illinois.' The same principle which makes the defendants below liable as common carriers to Little Falls would extend their liability to Chicago and even to Oregon and China. If they receive a chest of tea marked 'Houqua, Canton,' they must carry it there. The doctrine is too ruinous and monstrous in its consequences to remain for one hour the law of the land. A person engaged in the business of freighting from New York to Albany is accustomed to carry goods for every dealer and retailer and many of the consumers throughout the wide extent of the country, and he probably receives at each trip more than one hundred different parcels of merchandise, with as many different names of places marked thereon. To hold him responsible for the acts of others with whom he has no connection and over whom he has no control, and make him liable as a common carrier for the safety of each of these parcels till it reaches

in Derbyshire, a place beyond its route, which ended at Preston. The carrier was to be paid at the end of the journey. The parcel having been lost after it was forwarded from Preston, ROLFE, B., charged the jury that

its ultimate destination would be the short way to ruin him. His business could not be carried on under the operation of such a rule. If a contract is to be implied merely from a mark upon the box and without reference to the nature of the employment or business of the party, then every carman who receives a marked bale of merchandise is in great danger. If the fatal name of 'Peckagama' or 'Chegoimegon' appear upon the bale the carman in the city as well as the freighter on the Hudson will be held liable as a common carrier till the goods shall reach their destination. Such can not be the law. The practical inconvenience and injustice of such a rule would be too great to be endured." Bockee, Senator. in Van Santvoord v. St. John, 6 Hill, 157 (1843). "Goods from the city of New York are sent to every part of the United States, and in many cases must pass thousands of miles through the hands of a great number of common carriers, differing in their modes of transportation and through a variety of channels, exposed in unequal degrees to risk and hazard; the carriers having no other connection than such as consists in forming a continuous line of communication between distant points and having little or no opportunity of becoming acquainted with the character and responsibility of each other. If, therefore, those engaged in the business at the great and important points of shipment are to be held accountable for the safe delivery of property received by them until it reaches its most extreme point of destination and that accountability is to be inferred from the mere mark on the package or box copied into a receipt, but few responsible and trustworthy men will hereafter consent to incur such indefinite and far-extended liabilities, especially at the present prices of freight. The business will pass into the hands of mere adventurers—men who have but little to hazard in property or reputation—or the prices of freight must be increased in a ratio corresponding with the risk. Every one acquainted with the mode in which goods are shipped in New York for the country and especially with the hurried and pressing manner in which the business of the spring and fall is transacted must be aware of the difficulties of defining by special contract the precise liability which the carrier is to incur for each box or package of merchandise which may find its way on board his vessel. But upon the principles laid down by the Supreme Court there can be no necessity of producing a receipt in order to fix the liability of the common carrier. Goods may be delivered on board a tow-boat lying at New York, directed to one of the most remote settlements in the far west; and if the box or package be received without any qualification or explanation between the parties the mere fact of its delivery together with the direction marked upon it implies that the carrier has contracted to

where a common carrier takes into his care a parcel directed to a particular place and does not by positive agreement limit his responsibility to a part only of the distance, it is *prima facie* evidence of an undertaking on his part to carry that parcel to the place to which it is directed, and that the same rule applied although the place was beyond the limits within which he in general professed to perform the duties of a carrier. The jury found for the plaintiff and the case was taken to the Court of Exchequer, where the direction was approved.[11] In *Collins v. Bristol and Exeter Railway Company*,[12] the plaintiff delivered at the station of the Great Western Railway Company at Bath a van load of furniture to be conveyed to Torquay. The line of the latter company ended at Bristol, at which place that of the defendant company began, but the goods would have to be delivered to a third company before reaching Torquay. The receipt given by the Great Western Company was headed as follows: "To the Great Western Railway Company. Receive the undermentioned goods on the conditions stated on

transport it safely to its ultimate point of destination. And thus the carrier on the Hudson river who may honestly suppose that he has discharged his duty and obligation by transporting the goods to Albany, the extent of his route, and there delivering them to a safe and responsible line of boats on the canal, finds too late that his responsibility extended through a dozen re-shipments and carriages by land and water for thousands of miles, and is finally made to pay for the loss of the goods occasioned by the dishonesty or carelessness of some one at a point beyond the Rocky Mountains. There are many men in this State who are engaged as common carriers in the transportation of the produce of the country by land. One of these men receives a load of flour on board his wagon for the purpose of delivering it at some point on the Erie canal, the barrels being marked and directed to a town in the interior of the State of Maine. The carrier neglects to make a special contract that his liability is to cease at the point of delivery on the canal; but he delivers the flour in good order on the canal, and the property is forwarded from one line of transportation to another until it passes into the hands of the last carrier on the route, by whose want of care it is lost. It would under such circumstances be a most severe and harsh rule of law which should make the person who first undertook the transportation of the article liable for its loss." Rhoades, Senator, in Van Santvoord v. St. John, *supra*.

[11] 8 M. & W. 421 (1841).

[12] 11 Ex. 790 (1856).

the other side. To be sent to Torquay station and delivered to R. C. Collins, consignee, or his agent." One of the conditions exempted the company from liability for loss by fire. The Great Western Company received the carriage money for the whole distance from Bath to Torquay. On the arrival of the goods at Bristol they were put on the line of the defendant's, where they were destroyed by fire. An action being brought against them to recover for the loss, it was held by the Court of Exchequer that the contract was with the Great Western Company, and that the defendant company was not liable. This decision was reversed by the Court of Exchequer Chamber,[13] but the case being taken to the House of Lords the ruling of the Court of Exchequer was held right. "I think," said Lord CHELMSFORD, "that the contract was entire; was for the whole journey from Bath to Torquay and was made with the Great Western Railway Company alone; that the goods were carried on the defendants' railway under the contract, and that the defendants are consequently either not liable at all, as no agreement was entered into with them, or that if the contract in any way attaches to them, the exception as to loss by fire accompanies it and exonerates them from liability."[14] In *Coxon v. Great Western Railway Company*,[15] cattle were delivered at the London Station of the Shrewsbury & Hereford Railway Company to be carried to Birmingham. The line from London to Shrewsbury belonged to that company; from Shrewsbury to Birmingham to the defendants. The bill of lading contained this condition: "For the convenience of the owner the company will receive the charges payable to other companies for conveyance of such cattle over their lines of railway, but the company will not be subject to liability for any loss, delay, default or damage arising on such other railway." One sum was charged for the entire carriage, which was to be collected at Birmingham. The cattle were injured between Shrewsbury and

[13] 1 H. & N. 517 (1856).
[14] Directors of Bristol R. Co. v. Collins, 7 H. L. Cas. 194 (1858).
[15] 5 H. & N. 274 (1860).

Birmingham on the line of the connecting railway. In an action against this company it was held that the contract for the entire carriage was with the Shrewsbury & Hereford Railway, and that the defendant was not liable. Referring to the condition in the bill of lading, BRAMWELL, J., said: "They do not say that they will not carry on another railway, but only that they will not be liable for damage arising on such railway. So that there is an absolute refusal of liability for damage, but not a refusal to carry." The English doctrine then is that in the absence of a special condition the first carrier is liable to the destination; he is exclusively liable; for want of privity of contract the connecting carrier can not be sued by the shipper even though his negligence caused the loss.[16]

§ 240. *The American Doctrine.*—Although all the arguments of convenience as well as justice are in favor of the English rule, it must be admitted that it does not, except in a few States, prevail in this country. The fair result of the American cases limits the liability of the carrier, when no special contract is made, to his own line.[17] It is true that in Illinois,[18] Tennessee,[19] Iowa,[20] Florida[21] and New Hamp-

[16] Cases just cited and followed in Collins v. Bristol &c. R. Co., 11 Ex. 790 (1856); Scothorn v. South Staffordshire R. Co., 8 Ex. 341 (1853); Mytton v. Midland R. Co., 4 H. & N. 615 (1859); Crouch v. Great Western R. Co., 2 H. & N. 491 (1857); Great Western R. Co. v. Crouch, 3 H. & N. 183 (1858); Wilby v. West Cornwall R. Co., 2 H. & N. 703 (1858); Coxon v. Great Western R. Co., 5 H. & N. 274 (1860).

[17] Mr. Justice Hunt in Railroad Co. v. Pratt, 22 Wall. 123 (1874).

[18] Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88 (1870); Erie R. Co. v. Wilcox, 84 Ill. 239 (1876); Illinois Cent. R. Co. v. Copeland, 24 Ill. 332 (1860); Chicago &c. R. Co. v. People, 56 Ill. 365 (1870); United States Express Co. v. Haines, 67 Ill. 137 (1873); Adams Ex. Co. v. Wilson, 81 Ill. 339 (1876); Illinois Cent. R. Co. v. Johnson, 34 Ill. 389 (1864); Illinois Cent. R. Co. v. Cowles, 32 Ill. 116 (1863); Chicago &c. R. Co. v. Montfort, 60 Ill. 175 (1871); Field v. Chicago &c. R. Co., 71 Ill. 458 (1874); Milwaukee &c. R. Co. v. Smith, 84 Ill. 239.

[19] Louisville &c. R. Co. v. Campbell, 7 Heisk. 253 (1872); East Tennessee &c. R. Co. v. Rogers, 6 Heisk. 143 (1871); Western &c. R. Co. v. McElwee, 6 Heisk. 208 (1871); Carter v. Hough, 4 Sneed, 203 (1856); East Tennessee &c. R. Co. v. Nelson, 1 Coldw. 272 (1860).

[20] Mulligan v. Illinois Cent. R. Co., 36 Iowa, 181 (1873); Angle v. Mississippi &c. R. Co., 9 Iowa, 487 (1859).

[21] Bennett v. Filyaw, 1 Fla. 403 (1847).

shire,[22] the English rule, with one exception, obtains, and that in Georgia[23] the doctrine of *Muschamp's Case*, with its somewhat anomalous result, is adhered to. But in the other States it is regarded as the American doctrine that where a carrier receives goods marked for a particular destination, beyond the route for which he professes to carry and beyond the terminus of his road, he is only bound to transport and deliver them according to the established usage of his business and is not liable for losses beyond his own line.[24]

§ 241. *Which Carrier May be Sued.*—It has been noted that one of the consequences of the English doctrine has been to restrict the right of action against the first carrier, even though the loss or damage may have occurred through the fault or neglect of the one sought to be charged.[25] This portion of the English rule has been rejected in Illinois, Tennessee, Iowa and the other States which have followed *Muschamp's Case*, but has been adhered to by the Georgia courts.[26] Outside of this State the action will al-

[22] Lock Co. v. Railroad, 48 N. H. 339 (1869); Gray v. Jackson, 51 N. H. 9 (1871).

[23] Mosher v. Southern Ex. Co., 38 Ga. 37 (1868); Cohen v. Southern Ex. Co., 45 Ga. 148 (1872); Southern Ex. Co. v. Shea, 38 Ga. 519 (1868).

[24] Burroughs v. Norwich &c. R. Co., 100 Mass. 26 (1868); Babcock v. Lake Shore &c. R. Co., 49 N. Y. 491 (1872); Root v. Great Western R. Co., 45 N. Y. 524 (1871); Reed v. United States Ex. Co., 48 N. Y. 462 (1872); Jenneson v. Camden &c. R. Co., 4 Am. L. Reg. 235 (1856): Farmers &c. Bank v. Champlain Trans. Co., 16 Vt. 52 (1844); Cutts v. Brainerd, 42 Vt. 566 (1870): Condict v. Grand Trunk R. Co., 59 N. Y. 500 (1873); St. John v. Van Santvoord, 25 Wend. 660 (1841); *s. c.* 6 Hill, 157 (1843); Converse v. Norwich &c. R. Co., 33 Conn. 166 (1865); Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1871); Darling v. Boston &c. R. Co., 11 Allen, 295 (1865); Phillips v. North Carolina R. Co., 78 N. C. 294 (1878); Hood v. New York &c. R. Co., 22 Conn. 502 (1853); Railroad Co. v. Pratt. 22 Wall. 123 (1874); Railroad Co. v. Manufacturing Co., 16 Wall. 318 (1872); Crawford v. Southern R. Assn., 51 Mass. 222 (1875); Camden &c. R. Co. v. Forsyth, 61 Pa. St. 81 (1869); Irish v. Milwaukee &c. R. Co., 19 Minn. 376 (1872); Elmore v. Naugatuck R. Co., 23 Conn. 457 (1855); Baltimore &c. R. Co. v. Schumacher, 29 Md. 168 (1868); McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867); Brintnall v. Saratoga &c. R. Co., 32 Vt. 665 (1860); Inhabitants v. Hall, 61 Me. 517 (1873); Skinner v. Hall, 60 Me. 477 (1872); Perkins v. Portland &c. R. Co. 47 Me. 573 (1859); Nutting v. Connecticut &c. R. Co., 1 Gray, 502 (1854).

[25] *Ante*, § 239.

[26] *Ante*, § 240.

ways lie against the carrier in whose custody the goods were when lost or damaged.

§ 242. *Construction of Special Contracts.*— But even in the States in which the American doctrine is followed, there are cases to be found in which carriers have been held liable for the defaults of connecting lines. This has been usually on the ground of a special undertaking evidenced by the terms of the receipt or bill of lading given for the goods. Examples of these are shown below.[27] But this may often

[27] The following instruments were held to be through contracts:

"VERMONT CENTRAL RAILWAY COMPANY,
BURLINGTON, Sept. 13, 1866.

Received from W. R. Lewis,
1 box, weight 350

"Mark and numbers,
W. R. Lewis,
Brooklyn, Iowa.

"Numbered and marked as above, which the company promises to forward by its railroad, and to deliver to ——— or order, at its depot in ———, he or they first paying freight for the same, at the rate customary per ton of 2,000 lbs. N. B.— If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner.

G. S. APPLETON,
for the Corporation."

In construing the foregoing instrument the court said: "A majority of the court are of the opinion that the receipt in this case of itself constitutes a contract between the parties that the defendants, being common carriers, would carry said box to its destination—Brooklyn, Iowa—as per the marks thereon. As giving such character and effect to the paper much importance is attached to the fact that the blanks were left unfilled." Cutts v. Brainerd, 42 Vt. 566 (1870).

"New York, Nov. 14, 1853. Received of J. H. Schroeder, six boxes, * * to be forwarded per Hudson River Railroad freight train to Chicago." Schroeder v. Hudson River R. Co., 5 Duer, 55 (1855).

The first carrier gave a receipt for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the terminus of the first carrier in safety, where it was delivered to a connecting carrier to be taken to the place of destination, in whose charge it was lost. The first carrier was held liable. Kyle v. Laurens R. Co., 10 Rich. (S. C.) 382 (1857). In a suit against a railroad company it appeared that a box had been sent by the plaintiff and that a receipt was given for it by the company with the printed heading "through freight contract." Among the conditions attached was the following: "The responsibility of this company as a common carrier under this bill of

lading to terminate when the goods are unloaded from the cars at the place of delivery." The bill of lading also stipulated that the responsibility of the company should cease at the terminus of its road. The evidence showed that through freight was never unloaded at the terminus of the defendant's road, but that it was forwarded to the place of destination in the cars in which it was received. It was held that the company was liable for a loss occurring beyond the terminus of its own road. Toledo &c. R. Co. v. Merriman, 52 Ill. 123 (1869).

In the following instances the carriers were held not liable for defaults beyond their lines. Where a statute provided that railroad companies should not be liable for goods after they were delivered to a connecting carrier, it was held that where a railroad company received goods on a through rate, payable at the end of the route, and gave a written receipt to that effect, this was not a contract binding the company for the whole distance. East Tenn. R. Co. v. Montgomery, 44 Ga. 278 (1871). The plaintiff delivered a package addressed to the consignee in New York, to the Southern Express Company, in Mobile, paid the freight for the whole distance, and took a receipt, stating that "this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of the company for such package." The company's route extended no farther than Lynchburg, from which point the package was carried by the Adams Express Company to New York, under an arrangement by which the two companies shared in the freight *pro rata* for the whole distance. The package was safely delivered to the Adams Express Company at Lynchburg, but was never received in New York. It was held that the Adams Express Company was the agent of the Southern Express Company within the meaning of the receipt, and that the latter company was liable for the loss. St. John v. Express Co., 1 Woods, 612 (1871). An express company received a package of money from a bank at T to be transmitted to L, and in its receipt it undertook to forward it to the nearest place of destination reached by this company; by the conditions in the receipt the company was not to be liable "except as forwarders only, or for any default or negligence of any person or corporation to whom" the package should be delivered, "at any place off the established route run by this company," and such person or corporation was to be taken to be the agent of the consignor. To reach L the package was to be carried by three other express companies, but the consignees at L refused to receive it, and directed it to be returned to T, to which place it was returned by the same routes. On its arrival there and return to the bank, it was found that part of the money had been abstracted. The court held that the company receiving the package under the conditions recited were only liable at most as carriers to the end of its route, and beyond that only as forwarders; and that in an action by the bank against the receiving company the jury should have been instructed that if the evidence satisfied them that the loss had not occurred on the route of the defendant, either in going or returning, but on some other part

of the route, and that in the performance of its duties as a forwarder, it had used reasonable diligence in the selection of proper carriers, the defendant would not be liable. In this case Sharswood, J., said: "To hold that a forwarder merely is bound not merely to clear his own skirts of negligence, but to prove when, where and how, the loss occurred. would be to impose upon him an obligation which attaches only to a carrier, and not to an ordinary bailee for hire. A carrier who is bound, at all events, to deliver safely, must bring himself by positive evidence within the exceptions. Not so an ordinary bailee. It is enough for him to satisfy a jury, by the best evidence in his power that he has performed his duty with care and fidelity, and that the loss has not risen from any default of himself or his servants." American Ex. Co. v. Second National Bank, 69 Pa. St. 394 (1871). A stipulation in the receipt of an expressman for a package addressed to a consignee at a particular place in a certain city that it "is to be forwarded to our agency nearest or most convenient to destination only," *held* not to discharge the expressman from all liability other than for the safe delivery of the package at his own place of business in that city, and its safe keeping there upon arrival. If he has agents there who habitually deliver such packages according to the special address of each, he is bound to deliver the package as it is specially addressed according to the reasonable usages of his business. Sullivan v. Thompson, 99 Mass. 259 (1868). The fact that a company doing business as common carriers between particular points have intrusted blank envelopes, having their name printed upon them, to a customer for convenience in sending money, does not enable him to charge them as common carriers for losses beyond their route, by addressing the envelope containing money belonging to plaintiff, a third person, to a place beyond the end of the route, and delivering it to them to be transmitted. So held where the receipt given by the carriers to such customer for the package, expressly excluded liability beyond the terminus. Pendergast v. Adams Express Co., 101 Mass. 120 (1869). The superintendent of the defendant, a railroad company, wrote a letter to it, saying that the company had made arrangements for sending cotton through to New York by its own and connecting lines without detention, and soliciting his business. A showed the letter to B, who shipped certain cotton to New York on de-defendant's railroad and connecting lines as described in the letter. The court held that as B had not notified the defendant that he had shipped the cotton under the terms of the letter, the letter did not constitute an express contract for the transportation of the cotton, so as to make the defendant liable for delay occurring beyond the terminus of its own line. East Tennessee &c. R. Co. v. Montgomery, 44 Ga. 278 (1871). A contract between a consignor and an express company which, by its terms, is to terminate upon the delivery of the package at a certain point to another company to complete the transportation, and which contains no provision as to the liability of the second company, can have no effect in determining such liability in the absence of any arrangement between the two companies for the transportation of packages over the entire route. Witbeck v. Holland, 55 Barb. 443 (1870); Coates v. U. S. Ex. Co., 45

be shown without an express contract by evidence indicating an intention that the carriage should be through; as by

Mo. 238 (1870). An express company received at Chicago a package of bank bills marked "Bank of Dalton, Georgia, which we undertake to forward to Dalton, perils of navigation excepted; and it is hereby expressly agreed that this company are not bound for loss or damage except as forwarders only." The line of the company ended at New York. The court held that it was not the duty of the company to carry the package to Dalton, present it to the bank for redemption, and receive and return the proceeds, or if not redeemed, to return the package; but that it was only the duty of the company to carry it to New York and place it in the hands of a connecting company. Reed v. United States Ex. Co., 48 N. Y. 462 (1872). Where cotton is to be transported from one port to another, partly by steamer and partly by railroad, and the bill of lading, covering the whole route for which an entire freight is paid, excepts the danger of fire, and the cotton is burned by sparks from a locomotive, the owner must bear the loss. Oakey v. Gordon, 7 La. Ann. 235 (1852). And a notice that the carrier will not be responsible for baggage beyond his own line will be valid as against the passenger, although he receives the fare for the entire route, the notice stating that the carrier acted as agent of the connecting carriers. Pennsylvania R. Co. v. Schwarzenberger, 45 Pa. St. 208 (1863). An express company gave a receipt for goods marked "A. King, Clifton House, Windsor, N. S., C. O. D., $370, from Turner's Express, Boston, Mass." It appeared that Turner's Express was a connecting carrier. Parol evidence was admitted to prove the meaning of the mark "C. O. D.," and that it meant "collect on delivery." The defendant offered then to prove that by the custom and understanding of express companies and the public, this meant that the money mentioned was to be collected on delivery to A. King; but the court held that the contract was a plain one to collect on delivery to Turner's Express Company; that the evidence was therefore not admissible, and that the defendant was liable for not having collected the money from Turner's Express Company, notwithstanding it had received the goods under a contract limiting its liability to damage or loss occurring on its own line. Collender v. Dinsmore, 55 N. Y. 200 (1873).

The following instrument was held by the Supreme Court of Connecticut not to be a through contract.

"NEW YORK, May 7, 1864.

"Received from John M. Pendleton & Co., in good order, on board the Norwich and Worcester Boat, bound for Stafford, Ct., the following packages:

"Sixty-two (62) Bales Wool, 11,756 lbs.

"Marks,
"A.
"E. A. Converse & Son,
"Stafford, Ct.

C. of B.
Parker."

the receipt by the first carrier of the freight charges for the entire distance,[28] or other circumstances raising a similar presumption.[29] And where a partnership between a number of carriers exists by which they are to divide the profits and losses of the entire traffic, any one of the carriers may be held liable for loss of damage occurring on any part of the associated line.[30]

It was agreed by the parties that the wool mentioned in this receipt was taken on board The City of Boston, one of the steamboats of defendants, and carried to New London, and there landed and put into a depot building on the wharf during the night of that day, and that it was there destroyed by fire on the afternoon of the next day, which was Sunday. There was a contract for the through carriage of freight between the defendant and a railroad company. The defendant's line terminated at New London, where the railroad line commenced. The depot where the goods were stored was the place designated for the delivery of goods from the defendant to the railroad company. The court said: "Upon a careful and deliberate consideration of it [the evidence], we are satisfied that it did not satisfy the jury in finding a contract to carry the wool to Stafford, alone, or in company with the northern road; and that it does show an actual delivery to that road, as an independent and next carrier in a line, and a performance of all that the defendants impliedly undertook to do." Converse v. Norwich &c. R. Co., 33 Conn. 166 (1865).

[28] Reed v. Saratoga &c. R. Co. 19 Wend. 534 (1838); St. John v. Express Co., 1 Woods, 612 (1871); Berg v. Narragansett Steamship Co., 5 Daly, 394 (1874); Candee v. Pennsylvania R. Co., 21 Wis. 582 (1867); Railroad Co. v. Androscoggin Mills, 22 Wall. 594 (1874).

[29] In ascertaining the relation existing between connecting lines of carriers the parties are not confined to what is said in the bill of lading; but the shipper may introduce the way bills of the carrier with whom his contract was made, the statements of the agents of the carrier made when the bill of lading was given, or any special contract or understanding between the parties at the time the goods were shipped. St. John v. Express Co., 1 Woods, 612 (1871). Robinson v. Merchants Dispatch Co., 45 Iowa, 470 (1877); Root v. Great Western R. Co., 45 N. Y. 524 (1871); Railroad Co. v. Pratt, 22 Wall. 123 (1874); Hill Manf'g Co. v. Boston &c. R Co., 104 Mass. 122 (1870); Quimby v. Vanderbilt, 17 N. Y. 306 (1858).

[30] Where one railroad company agrees with another for a complete system of interchange of traffic from all the stations of one company, and beyond its limits to all parts of the other company and beyond its limits with through tickets, through rates, and invoices, and interchange of stock at junctions, the stock of the two companies to be treated as one stock, and that they should assist each other in every way, as if the whole concerns of the two companies were amalgamated, either company

§ 243. *When Connecting Carrier May Claim Exemptions in First Contract.*—A bill of lading may provide that its stipulations shall extend to and enure to the benefit of each and every company or person to whom the carrier issuing it may entrust or deliver the property, in which case its terms will define and limit the liability of every succeeding carrier.[31] And in the absence of an express provision to this effect a connecting carrier who receives goods from another to be forwarded to their destination is entitled to the exceptions which the latter has made with the shipper, in case the contract with the original carrier was for the entire route.[32] The

will be held as the agent of the other for making contracts as to carriage of freight over its road. Gill v. Manchester &c. R. Co., L. R. 8 Q. B. 136 (1873). If two express companies running as carriers over one continuous route, and dividing profits, employ one messenger who has the goods in charge during the whole transit, and who by agreement between the companies, is regarded as the agent of one company only up to a certain point on the line, and as the agent of the other company from thence to the end of the line, it would seem that the first company could not relieve itself from responsibility by giving a receipt to the consignor stipulating that the liability of the company should cease on delivery of the goods receipted for to another carrier, claiming that the two companies were different, and that the messenger ceased to be the agent of the first carrier at the point mentioned, and became the agent of the second company from that time, and that the loss occurred beyond the point on the line thus agreed upon as being the dividing point between the two companies. Schulter v. Adams Express Co., 6 Cent. L. J. 175 (1878) and see Wilson v. Chesapeake &c. R. Co., 21 Gratt. 654 (1872); Carter v. Peck, 4 Sneed, 203 (1856); Montgomery &c. R. Co. v. Moore, 51 Ala. 394 (1874); Ellsworth v. Tartt, 26 Ala. 733 (1855); Briggs v. Vanderbilt, 19 Barb. 222 (1855); Gass v. New York &c. Co., 99 Mass. 220 (1868); Weyland v. Elkins, Holt, N. P. 227, 1 Stark. 272 (1816); Laugher v. Painter, 5 B. & C. 547 (1826); Cobb v. Abbot, 14 Pick. 289 (1833); Pattison v. Blanchard, 5 N. Y. 186 (1851); Converse v. Norwick &c. Trans. Co., 33 Conn. 166 (1865); Cincinnati &c. R. Co. v. Spratt, 2 Duv. 4 (1865); Hart v. Rensselaer &c. R. Co., 8 N. Y. 37 (1853); Bostwick v. Champion, 11 Wend. 571 (1834); Champion v. Bostwick, 18 Wend. 175 (1837); Fromont v. Coupland, 2 Bing. 170 (1824).

[31] United States Express Co. v. Harris, 51 Ind. 127 (1875); Levy v. Southern Express Co., 4 S. C. 234 (1872).

[32] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871); Manhattan Oil Co. v. Camden &c. R. Co., 54 N. Y. 197 (873); Lamb v. Camden &c. R. Co., 2 Daly, 454 (1869); *s. c.* 46 N. Y. 271 (1871). A bill of lading was given in Georgia by the Evansville and Crawfordsville Railway Com-

connecting carrier is here the agent of the first one and can legally claim the benefit of any contract made with his

pany, an Indiana company, for cotton shipped to Boston. The bill of lading was a contract for the entire route. It stipulated that upon arrival of the cotton at Evansville, Indiana, and delivery of the same, the company would receive and forward the cotton to its destination upon the following conditions: "That the shipper, owner and consignee do hereby release the said company and the boats and railroads with which they connect, from the acts of Providence, or from damage or loss by fire or other casualty while in depots or places of trans-shipment; also damage or delays by unavoidable accident; also loss by fire, collision or dangers of navigation." Below and printed in red ink, was the following condition: "The Evansville and Crawfordsville Railroad Company will not be liable for loss or damage by fire, from any cause whatever." The cotton was burned, without the fault of the railroad company on which it was carried, before it got to the Evansville and Crawfordsville Railway; and it was contended that the case was governed by the condition printed in red ink, and that this condition only applied to losses on the railroad of the contracting company, and not to losses occuring on a connecting line, and before the cotton had reached the railroad in Indiana, and had been there received. But the court held that the contract evidenced by the bill of lading was a through contract, that the condition printed in red ink applied to the entire transit, and that the defendant was not answerable for the loss. Railroad Co. v. Androscoggin Mills, 22 Wall. 594 (1874.). The plaintiff being in charge of sheep, put them on a train on the North British Railway Company under a contract to send them from A to N. The plaintiff paid no fare, and traveled under an agreement with the company that he should not hold the company bound for any loss or injury that might happen to himself howsoever occasioned, on the journey for which it was used. The line of the North British Railway Company terminated at M; and from that point the plaintiff and his sheep were carried in the same cars in which they had started in continuation of the journey to N over the road of the Northeastern Railway Company, the cars in which the plaintiff and his sheep were traveling being attached to the train of the last named company, under arrangements between the two companies. After the train left M it was run into by another train of the last named company, owing to the negligence of its servants. It was held that the ticket under which the plaintiff traveled meant that he should be at his own risk during the whole journey, and enured to the benefit of either company. Blackburn, J., said: "It is clear that this is the true construction of the ticket: 'In consideration of my being carried the whole way free of charge, I agree that I shall be traveling the whole way at my own risk.'" Hall v. North Eastern R. Co., L. R. 10 Q. B. 437 (1875). But in England the question can hardly be of moment as under the rule of that country the right of action is confined to the first company in all cases. *Ante*, § 241.

principal. But additional stipulations made by the connecting carrier with the first can have no effect upon the shipper.[33]

§ 244. *When Exceptions in Contract With First Carrier do not Enure to Connecting Carrier.* — To none of the exceptions contained in the contract between the first carrier and the shipper which are intended solely for the protection of the former has the connecting carrier any claim.[34] When the carrier has simply contracted to transport over his own line and then deliver to another, the latter is not entitled to the benefit of the first contract, nor has the first carrier any authority to enter into a special contract on behalf of the owner with the connecting carrier limiting his common law liability.[35] If a bill of lading specifies certain railroads over which goods are to be carried and the goods are sent a part of the way by a road not thus mentioned, such road will not be entitled to its exceptions.[36] Following the American doctrine as to notices,[37] a common carrier can not, by a general notice put up in his office or distributed in hand-bills, exonerate himself from his legal duty and liability for property which is delivered to him for transportation, or fix the amount beyond which he will not be held responsible in case of injury or loss; although such property is delivered to him by another carrier, to whom the notice has been made known, and who received the same from the owner under an agreement to carry it over his own line, and then as agent of the consignor, to send it forward by a carrier.[38] Where goods are shipped on a through line under a contract with the first company, and they are lost on a second and connecting line,

[33] Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1871).

[34] Bancroft v. Merchants Dispatch Trans. Co., 47 Iowa, 262 (1877).

[35] Babcock v. Lake Shore &c. R. Co., 49 N. Y. 491 (1872); Martin v. American Ex. Co., 19 Wis. 336 (1865); Camden &c. R. Co. v. Forsyth, 61 Pa. St. 81 (1869); Merchants Dispatch Trans. Co. v. Bolles, 80 Ill. 473 (1875). But see Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1871); Hinkley v. New York Cent. R. Co., 3 T. & C. 281 (1874).

[36] Merchants Dispatch Trans. Co. v. Bolles, 80 Ill. 473 (1875).

[37] *Ante* Cap. IV.

[38] Judson v. Western R. Co. 6 Allen, 485 (1863); Michigan Cent. R. Co. v. Hale, 6 Mich. 243 (1859).

the contract of the company receiving the goods will not be modified by any rules and regulations of the second company, though such rules may have been publicly posted in the station house of the receiving company, where the shipper had often been.[39]

In two New York cases the topic of this section is considered at length. In *Babcock v. Lake Shore and Michigan Southern Railway Company*,[40] the plaintiff shipped fifty-two barrels of petroleum at Oil City, in the State of Pennsylvania, by the Atlantic and Great Western Railway Company, under an agreement of which the following is a copy:

"Received from Babcock for shipment by the Atlantic and Great Western Railway Company, the following property in good order, except as noted, marked and consigned as follows:"

Mark.	Article.
J. W. O. & Co.	
J. W. OSBORNE & Co.	52 Bbls. R. Oil Car 1, 848.
Albany N. Y.	
"Rate in cents per 100 lbs.	$25.00 per car.

"Which this company and connecting roads agree to deliver with as reasonable dispatch as their general business will permit, delays and accidents excepted, but they do not agree to transport the same by any particular train, nor in any specified time." Subject to the condition below:

"At Corry station upon payment of freight and charges thereon." Then followed a condition declaring that the shipper assumed all risk of damage for any loss or damage from any cause whatever "while in transit or at the depots or stations of any of the companies whose lines of road it may be transported over or upon." It was stated in the agreement that this exemption was conceded in consideration of the reduced rate at which the oil was to be carried, and that when the company took the usual risk of damage or loss, the rates were double the amount charged in that

[39] Railroad Co. v. Pratt, 22 Wall. 123 (1876).
[40] 49 N. Y. 491 (1872).

instance. It appeared in evidence that the charge made was the customary price for transportation of freight from Oil City to Corry, which was the end of the road of the carrier. At Corry the oil was delivered to the Buffalo and Pittsburg Railroad Company, which carried it to Brocton, where it was delivered to the defendant company, in whose possession the oil was destroyed by fire. The direction and address were in writing on a printed bill of lading, as was also the reference to Corry station. The following condition was printed: "In consideration of the reduced rate given and specified above for the transportation of petroleum, it is understood that the owner or shipper assumes all risk of damage from fire or leakage, or from any cause whatever, while in transit, or at the depots or stations of any of the companies whose lines of road it may be transported upon or over." It was held that the written parts controlled the printed form; that there was only a contract for carriage of the oil to Corry, and that the exemptions mentioned in the printed form did not enure to the benefit of the connecting carriers. ALLEN, J., said: "Carriers who are not named in a contract for the carriage of goods, and who are not formal parties to it, may under certain circumstances have the benefit of it. Such is the case when a contract is made by one of several carriers upon connecting lines or routes far the carriage of property over the several routes for an agreed price by authority express or implied of all the carriers. So, too, in the absence of any authority in advance, or any usage from which an authority might be inferred, a contract by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, would enure to the benefit of all thus ratifying it, and performing service under it. But in such and the like cases the contract has respect to and provides for the services of the carriers upon the connecting routes. There was no agreement here for the carriage of the oil beyond Corry, no rate of freight agreed upon to any other point, and the carrier was entitled to re-

ceive the freight earned, twenty-five dollars per car, on delivery of the oil at that place. There was no consideration for an agreement by the plaintiff to relieve the carriers who should thereafter receive the property for transportation from the common law liabilities, and no such agreement was made." In *Ætna Insurance Company v. Wheeler*,[41] the goods were shipped at Milwaukee under a bill of lading as follows: "Shipped in good order, by A. J. Hale, as agent and forwarder, for account and risk of whom it may concern, on board of the propeller City of New York, and bound for Ogdensburg, the following articles, marked and numbered as per margin, and which are to be delivered in like good order and condition. [The leakage of oils, molasses and other liquids, and the dangers and accidents of navigation, fire and collision excepted], without delay unto consignees at Ogdensburg, paying freight and charges." In the margin: "H. & W. Chickering, Boston, care of George Eddy, agent, Ogdensburg;" also a memorandum of property shipped, "freight to Boston, $1.10 per bbl." The transportation company, the owner of the propeller, had an arrangement with a railroad running eastward from Ogdensburg for the transportation of freight from that point, by which all freights jointly earned were to be divided between them. The defendant was in possession of this railroad. At Ogdensburg there was a warehouse which was used in common by both carriers. The goods were delivered in the warehouse by the propeller, and notice of that fact was given to the defendant, but they remained there for eight days because the defendant did not have cars enough to forward them and the other freight that had accumulated at that point. At the end of that time, the goods were destroyed by fire. It was held that this was not a through contract, and that the exceptions in the bill of lading did not enure to the benefit of the defendant. GROVER, J., said: "Had the transportation company contracted for the carriage of the flour to Boston, this case would be

[41] 49 N. Y. 616, (1872).

governed by the case last cited ;[42] but that was not the contract. It contracted for the carriage of the flour to Ogdensburg only ; and that the same should be forwarded by other lines to Boston ; and that the freight for the entire carriage should be $1.10 per barrel. Hence the case cited does not apply."

[42] Maghee v. Camden &c. R. Co., 45 N. Y. 514 (1871).

CHAPTER XII.

THE BURDEN OF PROOF.

SECTION.

245. Burden Upon Carrier to Explain Loss.
246. And to Show Restrictive Contract.
247. Burden on Carrier to Show that Loss is Within the Exceptions.
248. Burden of Proof as to Negligence — The American Doctrine.
249. Burden of Proof as to Negligence — Contrary View.
250. Burden of Proof as to Negligence — The Rule in Alabama.
251. Contrary Cases Distinguished.
252. Where Carrier Liable in Special Cases.
253. Where Exceptions are Conditional.
254. Pleading.

§ 245. *Burden Upon Carrier to Explain Loss.*—When goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he was not responsible.[1] Similarly, in the carriage of passengers, the carrier being under a contract implied by law to provide safe means of transportation, the happening of an accident is *prima facie* evidence of negligence on his part. In the leading case of *Christie v. Griggs*,[2] the action was against the proprietor of a stage coach for injury to a passenger, and the plaintiff's

[1] Nelson v. Woodruff, 1 Black, 156 (1861); Hunt v. The Cleveland, 6 McLean, 76 (1853); Bearse v. Ropes, 1 Sprague, 331 (1856); Kerr v. The Norman, 1 Newb. 525 (1855); and see cases *post*, § 248.

[2] 2 Camp. 79 (1809).

evidence showed that the injury was caused by the breaking of the axle-tree of the coach, upon the top of which he was seated. Lord MANSFIELD said: "The plaintiff has made a *prima facie* case by proving his going on the coach, the accident and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself, and how do they know whether the coach was well built or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident." The principle of this decision is well established both in England and America.[3]

[3] See Carpue v. London &c. R. Co., 5 Q. B. 747 (1844); Skinner v. London &c. R. Co., 2 E. L. & E. 360, *s. c.* 5 Exch. 787 (1850); Boyce v. California Stage Co., 25 Cal. 460 (1864); Transportation Co. v. Downer, 11 Wall. 129 (1870); Farish v. Reigle, 11 Gratt. 697 (1854); Brehm v. Great Western R. Co., 34 Barb. 256 (1861); McKinney v. Neil, 1 McLean, 540 (1839); Stockton v. Frey, 4 Gill, 406 (1846); Stokes v. Saltonstall, 13 Pet. 181 (1839); Lygo v. Newbold, 9 Exch. 302 (1854); Curtis v. Rochester &c. R. Co., 18 N. Y. 534 (1859). After referring to the language of Lord Mansfield in Christie v. Griggs, Mr. Parsons, in his valuable work on Contracts, vol. 2, p. 224, says: "Some question however may exist on this point. We should express our own view of the law thus. The plaintiff must not merely prove that he has sustained injury; but must go so much further as to show that he suffered from such accident, or from such other cause as may with reasonable probability be attributed to the negligence of the defendant. Thus far the *onus* is on the plaintiff. But then it shifts, and the defendant must prove an absence of negligence or of default on his part. And if the plaintiff has made out his *prima facie* case, and the evidence offered in defense leaves it uncertain whether there was negligence or not, the plaintiff must prevail." This does not seem to be quite clear. The author says that if it appears from all the evidence offered both by plaintiff and defendant that it is doubt-

§ 246. *And to Show Restrictive Contract.*—Upon the carrier who alleges it and who seeks to avoid liability through its provisions, rests the burden of proof of a contract limiting his common law responsibility.[4] It has been laid down in Illinois as the rule of that State that as a party accepting receipts for his goods does not in many cases comprehend their true import, the most satisfactory evidence must be furnished by the carrier that their terms were understood and assented to by him.[5] This rule will commend itself as one eminently proper in this class of cases, for all the reasons against the relaxation of the common law rule of liability which have been already stated in former parts of this treatise, support the principle that proof of a contract in limitation of liability must be clear. It is likewise incumbent on the carrier to show that a receipt containing conditions of exemption was given under circumstances indicating fairness and good faith.[6] But further than this he is not required to go. In *Adams Express Company v. Guthrie*,[7] the jury were instructed that they could not find

ful whether the injury complained of was the result of the negligence of the carrier, then the plaintiff must prevail, "extraordinary care being demanded of the carrier, and only ordinary care of the passenger." But if the plaintiff should prove the event by which the injury was caused, and should stop there, it would appear to be doubtful whether the injury should be ascribed to the negligence of the carrier or not, since there would be no evidence on that point. It would therefore seem that the plaintiff ought to prevail without going any further. The plaintiff's evidence would be all the evidence in the case, unless the defendant should think proper to introduce further testimony, and as the evidence would leave the matter doubtful on the whole case as thus presented, the plaintiff should be allowed to prevail, even according to the statement of the rule by Mr. Parsons, for we can not understand him as saying that the reasons for a decision should not be drawn from all the evidence introduced, whether it come from the side of the plaintiff alone or from both parties.

[4] Western Trans. Co. v. Newhall, 24 Ill. 466 (1860); Gaines v. Union Trans. Co., 28 Ohio St. 418 (1876); and see cases *post*, § 248.

[5] Boskowitz v. Adams Ex. Co., 5 Cent. L. J. 58 (1877).

[6] Adams Ex. Co. v. Guthrie, 9 Bush. 78 (1872); Southern Ex. Co. v. Urquhart, 52 Ga. 142 (1874); Louisville &c. R. Co. v. Hedger, 9 Bush. 645 (1873).

[7] 9 Bush. 78 (1872).

that the special contract relied upon by the defendant to limit its liability had been accepted, unless they believed that the plaintiff or his agents had read the receipt or that some one of them fully understood and agreed to its terms, and that the *onus* was on the defendant. This was held to be error, the Supreme Court saying: "In our opinion it is only necessary that the carrier shall satisfactorily prove that a special contract was made under circumstances indicating fairness and good faith, and that it is then incumbent upon the shipper to show that the contract ought not for the reasons above indicated [duress, imposture or delusion] to be enforced against him." Under the English statutes the burden of showing that a condition was "just and reasonable" is on the carrier.[8]

§ 247. *Burden on Carrier to Show that Loss is Within Exemptions.*—And the burden of proof is upon the carrier not only to show that a limited contract has been made but also that the loss in question arose from a cause excepted in this contract.[9] And this fact must be established with reasonable certainty and not rest upon conjecture or possibility, for if upon the whole case it is doubtful whether the loss arose from an excepted cause or through the negligence or want of skill of the carrier, the latter will have to bear it.[10]

§ 248. *Burden of Proof as to Negligence — The American Doctrine.* — The law of this country being as before stated that an exception in the contract of a common carrier will not, on grounds of public policy, be allowed to include

[8] Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473 (1863).

[9] The Freedom, L. R. 3 P. C. 594, 24 L. T. (N. S.) 452 (1871); Verner v. Sweitzer, 32 Pa. St. 208 (1858); Bennett v. Filyaw, 1 Fla. 403 (1847); Alden v. Pearson, 3 Gray, 342 (1855); and see cases *post*, § 248.

[10] The Live Yankee, 1 Deady, 420 (1868). The carrier can not discharge himself by showing that the navigation was difficult or dangerous, or that he employed skilful and competent persons to control and manage the boat; he must show the actual manner of the loss. Hill v. Sturgeon, 28 Mo. 323 (1859). Although it may be shown that the boat of a carrier is not seaworthy, he may still show that the loss was not occasioned by its unseaworthiness, but by one of the perils excepted in the bill of lading. Smith v. Whitman, 13 Mo. 352 (1850).

his negligence or the negligence of his agents and servants, the question early arose whether where the defense is that the loss resulted from an excepted risk it will be sufficient for the carrier to bring the case within the exception to prove that it proceeded from the cause therein mentioned, or whether he is to be called upon to go further and to prove that he was guilty of no negligence contributing to the excepted loss. Upon this question three different views have been taken. The first which is the rule in England[11] and which is supported by a multitude of cases in this country, answers the question in favor of the carrier, and refusing to presume negligence where none is shown, considers the carrier as excused upon his showing that the loss arose from a cause for which according to the terms of his contract he was not to be held responsible. The burden of proving negligence thereupon devolves upon the shipper. This, so far as the preponderance of authority is concerned, may be well called the American doctrine.[12]

[11] Ohrloff v. Briscall, L. R. 1 P. C. 231, 12 Jur. (N. S). 675, 35 L. J. P. C. 63, 15 W. R. 202, 14 L. T. (N. S.) 873, 4 Moore, P. C. C. (N. S.) 70; *s. c.*, *sub nom*, The Helene, B. & L. 429 (1866); Czech v. General Steam Navigation Co., L. R. 3 C. P. 14, 37 L. J. C. P. 3, 16 W. R. 130, 17 L. T. (N. S.) 246 (1867); Richardson v. Sewell, 2 Smith, (Q. B.) 205 (1805).

[12] Alden v. Pearson, 3 Gray, 342 (1855); American Ex. Co. v. Sands, 55 Pa. St. 140 (1867); The Antoinetta C., 5 Ben. 564 (1872); Baltimore &c. R. Co. v. Brady, 32 Md. 333 (1869); Bazin v. Steamship Co., 3 Wall. Jr. 229 (1857); Bearse v. Ropes, 1 Sprague, 331 (1856); Bennett v. Filyaw, 1 Fla. 403 (1847); Brauer v. The Almoner, 18 La. Ann. 266 (1866); Carey v. Atkins, 6 Ben. 562 (1873); Chubb v. Renaud, 26 Law Rep. 492 (1864); Clark v. Barnwell, 12 How. 272 (1851); Clark v. St. Louis &c. R. Co., 64 Mo. 440 (1877); Colton v. Cleveland &c. R. Co., 67 Pa. St. 211 (1870); Dedekam v. Vose, 3 Blatchf. 44 (1853); The Delhi, 4 Ben. 345 (1870); Dunseth v. Wade, 3 Ill. 285 (1840); Edwards v. The Cahawba, 14 La. Ann. 224 (1859); The Emily v. Carney, 5 Kas. 645 (1864); The Emma Johnson, 1 Sprague, 527 (1860); Farnham v. Camden &c. R. Co., 55 Pa. St. 53 (1867); Frank v. Adams Ex. Co., 18 La. Ann. 279 (1866); French v. Buffalo &c. R. Co., 4 Keyes, 108, *s. c.* 2 Abb. App. Dec. 196 (1868); Hays v. Miller, 77 Pa. St. 238 (1874); Hill v. Sturgeon, 28 Mo. 323 (1859); Hooper v. Rathbone, Tan. Dec. 519 (1858); Hubbard v. Harnden's Ex. Co., 10 R. I. 251 (1872); Hunnewell v. Tabor, 2 Sprague, 1 (1854); Hunt v. The Cleveland, 6 McLean, 76 (1853);

§ 249. *Burden of Proof as to Negligence — Contrary View.*— In Greenleaf on Evidence it is said: "And if the acceptance of the goods was special, the burden of proof is

The Invincible, 1 Lowell, 225 (1868); Jones v. Walker, 5 Yerg. 427 (1827); The Juniata Paton, 1 Biss. 15 (1852); Kallman v. U. S. Ex. Co., 3 Kas. 205 (1865); Kelham v. The Kensington, 24 La. Ann. 100 (1872); The Keokuk, 1 Biss. 522 (1866); Kansas Pac. R. Co. v. Reynolds, 8 Kas. 623 (1871); King v. Shepherd, 3 Story, 349 (1844); Kirk v. Folsom, 23 La. Ann. 584 (1871); The Lady Pike, 2 Biss. 141 (1869); Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1871); Lamb v. Parkman, 1 Sprague, 343 (1857); Lawrence v. New York &c. R. Co., 36 Conn. 63 (1869); Magnin v. Dinsmore, 6 J. & S. 284 (1874); Mitchell v. U. S. Ex. Co., 46 Iowa. 214 (1877); The Mollie Mohler, 2 Biss. 505 (1871); Moore v. Evans, 14 Barb. 524 (1852); New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344 (1848); New Orleans Ins. Co. v. New Orleans &c. R. Co., 20 La. Ann. 302 (1868); The Niagara v. Cordes, 21 How. 7 (1858); The Ocean Wave, 3 Biss. 317 (1872); The Olbers, 3 Ben. 148 (1869); The Oriflamme, 1 Sawy. 176 (1870); Patterson v. Clyde, 67 Pa. St. 500 (1871); Price v. Uriel, 10 La. Ann. 413 (1855); Rich v. Lambert, 12 How. 347 (1851); The Rocket, 1 Biss 354 (1860); Smith v. North Carolina R. Co., 64 N. C. 235 (1870); Sunderland v. Westcott, 2 Sweeny, 260, 40 How. Pr. 468 (1870); Thomas v. The Morning Glory, 13 La. Ann. 269 (1858); Transportation Co. v. Downer, 11 Wall. 129 (1870); Turner v. The Black Warrior, 1 McAll. 181 (1856); Turney v. Wilson, 7 Yerg. 340 (1835); Tysen v. Moore, 56 Barb. 442 (1870); Van Schaack v. Northern Trans. Co., 3 Biss. 394 (1872); The Vivid, 4 Ben. 319 (1870). Plate glass was shipped under a bill of lading exempting liability for damage by "breakage." When it arrived it was broken. *Held*, that the burden of proving negligence was on the shipper. The Pereire, 8 Ben. 301 (1875). Casks of wine were shipped under a bill of lading with a condition "not liable for leakage or breakage." Some were empty on their arrival, others partially so. Proof of the inferior quality of the casks having been given, it was held that the burden of showing negligence was on the shipper. Six Hundred and Thirty Casks, 14 Blatchf. 517 (1878). Notwithstanding a bill of lading contains a provision that the vessel shall not be accountable "for leakage, breakage, or rust," the vessel is nevertheless responsible for negligence or want of skill or care in her lading, storage or delivery of cargo. But such negligence, want of skill or care, must be affirmatively shown by the party alleging it. The Invincible, 1 Lowell, 225 (1868). Where several barrels of a cargo of petroleum were delivered empty, and the bill of lading provided that freight should be "payable on each and every barrel delivered full, not full or empty." *Held*, that the burden of proof was upon the party seeking to charge the carrier to show that the leakage was the result of negligence. Forbes v. Dallett, 9 Phila. 515 (1872). Where goods are shipped under a contract by which the consignor assumes all risks of the carriage, and

still on the carrier to show not only that the cause of the loss was within the terms of the exception but also that

it appears that they were lost through defects in the vehicles in which they were carried, the burden of proof is on the carrier to show that the loss was not caused by the negligence of the carrier. Empire Trans. Co. v. Wamsutta Oil Co., 63 Pa. St. 14 (1869). "If the carrier prove that the injury or loss was occasioned by one of those occurrences which are termed the acts of God, *prima facie* he discharges himself, and the *onus* of proving that the alleged cause or agency would not have produced the loss or injury without his negligence or defective means, is thrown upon the plaintiff." New Brunswick Steam Nav. Co. v. Tiers, 24 N. J. (Law), 677 (1853). An express company gave the consignor on receipt of a package of money notice that their liability was "as forwarders only." It was carried by them to the end of their route and there delivered to a connecting carrier. The consignee of the package refused to receive it, and ordered it to be returned to the city where first received by the express company, and on its arrival there a part of the money had been abstracted. The burden was not upon the company to prove when, where, or by whose negligence the package was lost. American Express Co. v. Second National Bank, 69 Pa. St. 394 (1871). "The defendant was exonorated from all liability as carrier for a loss caused by the destruction of the cotton by fire, by an express provision of the contract in pursuance of which it transported the cotton. Relieved of this responsibility, it was liable only in case it was so destroyed as bailee for hire; and it is undisputed that such a bailee is liable for the loss of the property only in cases where the loss is the result of his negligence. The question is whether in case of loss by a bailee for hire, the bailor can recover upon simple proof of loss, unless the bailee shall prove that he was free from all negligence contributing to such loss, or whether the bailor must go further and prove that the loss was caused by the negligence of the bailee. I believe this to be a fair statement of the question between the parties to the present action, and yet so stated no one will hardly insist that the bailor can recover without affirmatively proving that the loss was caused by the negligence of the bailee." Lamb v. Camden &c. R. Co., 46 N. Y. 271 (1871). The rule in Missouri is thus stated: In a suit against a carrier the plaintiff is only bound in the first instance to prove delivery and loss; if defendant pleads an exemption under the contract, the burden is on him to prove that the loss was occasioned by the causes excepted; but he is not required to go further and prove that he was guilty of no negligence. Proof of that fact will rest on the plaintiff; and such proof is made out by showing that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the carrier. Read v. St. Louis &c. R. Co., 60 Mo. 199 (1875). But see Ketchum v. American &c. Express Co., 52 Mo. 390 (1873); Lupe v. Atlantic &c. R. Co., 3 Mo. (App.) 77 (1876). What is considered as evidence of negligence has been shown in a former chapter. See *ante*, Cap. VI, § 138.

there was on his part no negligence or want of due care." [13] This rule has the support of a few authorities.[14] The reasons upon which it is founded are presented by LUMPKIN, J., in a Georgia case,[15] wherein he says: "What shipper when he demands his cotton at the place of delivery is satisfied to be told that it was burnt? He wants to know how it was burnt; and the carrier is bound to give the explanation, for he and his servants alone can do it. He is only excused if the fire was unavoidable and he should prove that it was so. It is, I repeat, in his power to show the facts, and it should for that reason be made his duty to do so. Shippers are obliged to trust to carriers. In the servants and employees of the carrier the shipper will always find reluctant witnesses. Why force the owner of produce to make them his witnesses and thus indorse their credibility? In Tennessee the employees and servants of railroads are not allowed to be witnesses in behalf of their employers. Why compel plaintiffs to make them their witnesses and bind them by the truth of their testimony? The more negligent they have been in the discharge of their duty, the more difficult it will be to extort the truth from them. Could they be expected to swear that the cargo was burnt by their negligence? To place the *onus* upon the plaintiff would be to deny him all redress. I admit the general rule that he who alleges must prove. But it is equally well established that the burden of proof should be upon him who best knows what the facts are. If it be said that the agents and servants may be resorted to by the shipper as

[13] 2 Greenlf. on Ev., § 219.

[14] Davidson v. Graham, 2 Ohio St. 131 (1853); Graham v. Davis, 4 Ohio St. 362 (1854); United States Express Co. v. Bachman, 2 Cin. 251 (1872), affirmed 28 Ohio St. 144 (1875); Erie R. Co. v. Lockwood, 28 Ohio St. 358 (1876); Gaines v. Union Transportation Co., Id. 418 (1876); Whitesides v. Russell, 8 W. & S. 44 (1844); Hays v. Kennedy, 41 Pa. St. 378 (1861); Union Express Co. v. Graham, 26 Ohio St. 595 (1875); Berry v. Cooper, 28 Ga. 543 (1859); Swindler v. Hilliard, 2 Rich. (S. C.) 216 (1846); Baker v. Brinson, 9 Rich. (S. C.) 201 (1856); Cameron v. Rich, 4 Strobh. 168 (1850), *s. c.*, 5 Rich. (S. C.) 352 (1852); Southern Express Co. v. Newby, 36 Ga. 635 (1867).

[15] Berry v. Cooper, 28 Ga. 543 (1859).

well as the carrier, we have only to repeat that their wishes, feelings and interests are all on the side of their employers. Let the carrier then prove the loss and the manner of the loss. Policy as well as the safety of all concerned demands the establishment of such a rule." In an Alabama case it is said: "One result of the introduction of steamboats and railroads is that common carriers have to a great extent taken exclusive possession of the public thoroughfares of the country, and have it in their power to impose their own terms upon the owners of goods who indeed have no choice but to employ them. The owner accepts the conditional bill of lading because he can not well help it. He must have his goods carried and he sees that the carrier will refuse to take them unless the prescribed terms are accepted. The owner seldom accompanies his property, and in case of loss or injury, however gross the negligence may be, is unable to prove it without relying upon the servants of the carrier — the very persons generally by whose negligence (if there was negligence) the goods have been lost; whose feelings, wishes and interests are all against the owner, and who are as a general rule only too ready to exculpate themselves and their employer. Of the manner of the loss the owner is generally entirely ignorant, while the carrier and his servants may be reasonably supposed to be fully advised in regard to it; and that is a sound rule which devolves the *onus* on him who best knows what the facts are." [16]

§ 250. *Burden of Proof as to Negligence — The Rule in Alabama.* — But in Alabama a still different rule exists. It is held in that State that where the carrier shows that the loss occurred from a cause for the consequences of which he is not liable under his contract, the *onus* is still on him to show the exercise of due care and diligence on his part to prevent the injury.[17] This was ruled in a case where a bill of lading contained an express stipulation that the carrier

[16] Steele v. Townsend, 37 Ala. 247 (1861).

[17] Steele v. Townsend, 37 Ala. 247 (1861); South &c. Alabama R. Co. v. Henlein, 52 Ala. 606 (1875).

was not accountable for rust or breakage. It was held that proof of injury to the goods by breakage made a *prima facie* case of negligence of the carrier, and that the *onus* was on him to show due care, unless the nature of the goods furnished evidence of itself that due care and vigilance could not have prevented the injury.[18] "It is not strictly accurate to say," said WALKER, J., in this case "that the *onus* is on the carrier to show not only that the cause of loss was within the exception, but also that he exercised due care. The correct view is that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier, and as it is for the carrier to bring himself within the exception he must make at least a *prima facie* showing that the injury was not caused by his neglect." In a later case[19] it is said: "The law of this State, then, stands as follows: The shipper makes a *prima facie* case against the carrier when he shows the goods were not delivered. This casts the *onus* on the carrier to show that the loss occurred from [an excepted cause], and he must also prove a *prima facie* case of diligence on his part. This, of course, implies a river-worthy vessel, properly furnished and appointed, competent and sufficient officers and crew, and care and vigilance to prevent danger and to avert it when impending. Any deficiency in the skill or watchfulness of the officers or crew in the matter of their special function; in the apparatus to extinguish fire, etc., would fall short of proving a *prima facie* case of diligence. Beyond these two shifting stages our decisions have declared no rule in the matter of the burden of proof. The opinion in *Steele v. Townsend* was delivered by an able and prudent judge, and we adhere to it, believing the principle to be sound." This rule is sustained in all the other cases in this State.[20] It and the rule as stated by Mr. Greenleaf are certainly founded upon rea-

[18] Steele v. Townsend, 1 Ala. Sel. Cas. 201, 37 Ala. 247 (1861).

[19] Grey v. Mobile Trade Co., 55 Ala. 387 (1876).

[20] South &c. Alabama R. Co. v. Henlein, 52 Ala. 606 (1875); Mobile &c. R. Co. v. Jarboe, 41 Ala. 644 (1870).

son and public policy, but they lack, as has been seen, the support of authority.[21]

§ 251. *Contrary Cases Distinguished.* — AGNEW, J., in *Patterson v. Clyde*,[22] distinguishes the cases wherein it is held that the exception being "the dangers of the river," the carrier must prove not only the manner of the loss but also that care had been used to avoid it, from the case at bar where the exemption was from loss by fire. "Without proof of the circumstances," he says, "it is impossible to say whether the loss arose from a danger of navigation. Such a peril can only be known from its facts. * * * A peril of navigation is a thing having no definite fact to rest upon in the writing, but must be made to appear in the very facts of the loss. But not so as to a loss by fire which is a specific thing and determines at once the character of the loss." So in the earlier case of *Humphreys v. Reed*,[23] KENNEDY, J., states the principle thus: "The striking of a boat upon the stone or rock in the canal may or may not fall within the exception. Whether it would or not must always depend upon the particular circumstances attending it, either going to show that it happened in consequence of some fault on the part of the master or those who were intrusted with the management of the boat, or that it occurred without any default in them. In this latter case the loss occasioned by the sinking of the boat against the stone would seem to come fairly within the exception; but in the former it would be clearly chargeable to the master or owner of the boat. For instance, if the stone from its position may be readily seen and avoided by those having the conduct of the boat; or although not visible yet if its situation be generally known, the loss ought to be imputed to the fault of the captain or those having the direction of the boat. But if on the other hand the circumstance of the stone being in the canal was not generally known and unknown to the party

[21] *Ante*, § 248.
[22] 67 Pa. St. 500 (1871).
[23] 6 Whart. 435 (1841).

having the command of the boat, and was invisible to the common eye, the loss occasioned by the boat striking on it ought to be considered as coming within the exception which embraces all dangers of navigation."

§ 252. *Where Carrier Liable in Special Cases.*—The burden of proof is upon the shipper to show that the loss was from a cause for which by the very terms of the contract the carrier was to be liable. Thus where the liability of a common carrier for loss or damage is limited by express contract to the case of fraud or gross negligence of himself, his agents or his servants, in an action against him the burden of proving such fraud or negligence is on the plaintiff, who must also show that such fraud or negligence was the cause of or at least contributed to the injury.[24]

§ 253. *Where Exceptions are Conditional.*—Where the exceptions are conditional the carrier must show his compliance with the conditions, as where iron is shipped, the carrier not to be liable for rust if the iron is properly stowed, he must show that it was properly stowed.[25]

§ 254. *Pleading.*—In actions of the kind considered in this treatise, the declaration should be upon the common law liability of the defendant as a common carrier, for if the shipper should declare upon the bill of lading, he would be by his pleadings estopped from raising the question of assent to the exemptions under which the carrier seeks to escape liability. If, however, for any reasons, suit is brought upon the express contract its exceptions must be stated—at least those which go to discharge him entirely.[26] The person to

[24] Adams Express Co. v. Loeb, 7 Bush, 499 (1870); Bankard v. Baltimore &c. R. Co., 34 Md. 197 (1870); Landsberg v. Dinsmore, 4 Daly, 490 (1873); Steers v. Liverpool &c. Steamship Co., 57 N. Y. 1 (1874). To instruct the jury in such a case that the burden of proof is on the defendant is error, and the judgment will be reversed on appeal, notwithstanding the fact that the evidence as it stands shows negligence. Cochran v. Dinsmore, 49 N. Y. 249 (1872); Cragin v. New York &c. R. Co., 51 N. Y. 61 (1872).

[25] Edwards v. The Cahawba, 14 La. Ann. 224 (1859).

[26] Ferguson v. Cappeau, 6 H. & J. 394 (1825); Fairchild v. Slocum, 19 Wend. 329 (1838); *s. c.* 7 Hill, 292 (1843); Clark v. St. Louis &c. R. Co.,

whom the receipt is given may bring the action for the loss, although the property may belong to another, the contract being with him.[27]

64 Mo. 440 (1877); and see Oxley v. St. Louis &c. R. Co., 65 Mo. 629 (1877); Indianapolis &c. R. Co. v. Remmy, 13 Ind. 518 (1859); Tuggle v. St. Louis &c. R. Co., 62 Mo. 425 (1876); Jeffersonville &c. R. Co. v. Worland, 50 Ind. 339 (1875).

[27] Northern Line Packet Co. v. Shearer, 61 Ill. 263 (1871).

CHAPTER XIII.

UNREPORTED CASES.*

SECTION.

255. *Phœnix Insurance Company v. Erie and Western Transportation Company.*— Power to Limit Liability — Rule in Illinois as to Assent to Conditions — Right of Insurer—Power of Carrier to Contract for Benefit of Insurance—Illinois Statute Construed. —United States District Court, Eastern District of Wisconsin.

256. *Richards v. Hansen.*— Common Carriers by Water — Exceptions of "Perils of the Sea," "Leakage, Breakage or Rust"—Negligence — Burden of Proof.— United States Circuit Court, District of Massachusetts.

257. *Wertheimer v. Pennsylvania Railroad Company.*— Assent to Conditions in Bill of Lading—Exceptions from Loss by "Fire"—Burden of Proof—Acts of Mob.—United States Circuit Court, Southern District of New York.

258. *Hall v. Pennsylvania Railroad Company.*—Status of Carrier After Special Contract—Delay— Destruction of Property by Mob— Exception from Loss "While in Transit or Depots."— United States Circuit Court, Eastern District of Pennsylvania.

259. *Galt v. Adams Express Company.*— Express Company — "Forwarder"— Negligence — Condition in Receipt as to Value of Article — Duty of Shipper.— Supreme Court of the District of Columbia.

260. *Bank of Kentucky v. Adams Express Company.*— Express Company — Liability for Losses Caused by Negligence of Railroad — Condition in Receipt Limiting Liability — Evidence of Assent.— United States Circuit Court, District of Kentucky.

261. *Burke v. Southeastern Railway Company.*— Passenger Tickets — Conditions Printed Thereon — Notice.— English High Court of Justice, Common Pleas Division.

* The cases given in this chapter are not at this time accessible to the profession, not being as yet published in the reports. Reports of two of them have appeared in the newspapers, and the others with one exception are not likely to be elsewhere reported in an authoritative form.

§ 255.—POWER TO LIMIT LIABILITY—RULE IN ILLINOIS AS TO ASSENT TO CONDITIONS—RIGHT OF INSURER—POWER OF CARRIER TO CONTRACT FOR BENEFIT OF INSURANCE—ILLINOIS STATUTE CONSTRUED.

PHŒNIX INSURANCE COMPANY v. ERIE AND WESTERN TRANSPORTATION COMPANY.

United States District Court, Eastern District of Wisconsin, October, 1879.

Before Hon. CHARLES E. DYER, District Judge.

1. A common carrier may limit his common law liability by contract, but can not lawfully stipulate for exemption from responsibility for the misconduct or negligence of himself or his servants.
2. In Illinois a strict rule exists relative to proof of affirmative assent to conditions in the contracts of carriers limiting their common law liability.
3. An insurer of goods lost while in the course of transportation by a common carrier is entitled after payment of the loss to recover what he has paid, by suit against the carrier.
4. A common carrier has an insurable interest in the goods he carries and has power to make a contract giving to himself the benefit of any insurance effected on them by the owner.
5. In the contracts of common carriers, if an excepted loss be remotely caused by the negligence of the carrier, the latter is still liable notwithstanding the exception.
6. In the case of marine insurance, a loss whose proximate cause is one of the risks enumerated in the policy is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master or mariners.
7. Bills of lading given by the carrier to the shipper provided that the former should not be liable for losses caused by "dangers of navigation," and that in case of loss for which the owner should be liable, he should have the benefit of any insurance effected by the shipper on the property transported. The property was lost through the negligence of the carrier. The insurance company having paid the loss to the shipper: *Held*, that the company had no right of action against the carrier.
8. The Illinois statute forbidding contracts limiting the liabilities of carriers does not affect the right of the carrier to contract with the shipper for the benefit of insurance.

This was a libel to recover for the loss of certain shipments of grain delivered on board the propeller Merchant,

July 24 1874, at Chicago, to be transported so far as it was to be carried on the lakes to Erie, Pa.

At the time stated libellant was a corporation of the State of New York, authorized to transact a general lake and inland insurance business. Respondent was a corporation of the State of Pennsylvania authorized to carry on the business of lake transportation, and was the proprietor of a line of propellers running between Erie and lake ports, designated as the "Anchor Line," one of which boats was the propeller Merchant.

On said 24th day of July, 1874, the Merchant received on board at Chicago, 16,325.34 bushels of corn, consigned to A. M. Wright & Co.; 800 bushels of corn, consigned to Elmendorf & Co., and 689.02 bushels of oats and 370.30 bushels of corn, consigned to Gilbert Wolcott & Co. Bills of lading were issued for and on account of these several shipments, the parts of which acknowledging receipt of the grain were as follows:

"Received Chicago July 24th, of A. M. Wright & Co., the following packages (contents unknown), in apparent good condition 400 bushels corn; order A. M. Wright & Co., Liverpool, Eng. Notify American Steamship Co., Philadelphia, Pa. Pro Merchant."

"Received Chicago July 24th 1874, of Elmendorf & Co., the following packages (contents unknown), in apparent good condition, 16,323.34 bushels of corn; order Elmendorf & Co. Notify Abm. Whitenack, Bound Brook, N. J.; 400 bushels corn, order same. Notify Wilkinson, Geddes & Co., Newwark, N. J."

"Received Chicago July 24th 1874, of Gilbert Wolcott & Co., the following packages (contents unknown), in apparent good condition 689.02 bushels white oats, 370.30 bushels No. 2 corn; order Gilbert Wolcott & Co. Notify Louis Buehler, Tamaqua, Pa. Pro. Merchant."

Material parts of the heading of these bills of lading were as follows: "Anchor Line; Lake and Rail *via* Erie and the Anchor Line Steamers, from all Lake Michigan

ports. The Erie and Western Transportation Company is the proprietor of the 'Anchor Line,' which issues this bill of lading, and is a corporation of the State of Pennsylvania having a real capital. The 'Anchor Line' is the authorized and exclusive agent of the Pennsylvania Railroad Co., for its lake business *via* the Philadelphia & Erie Railroad and connections. It offers to the public a line of first class propellers between the city of Erie and lake ports. Responsible through bills of lading and the shortest lake and rail line to the East."

In the bill of lading issued to Wright & Co., was the clause, "rates from Chicago to Philadelphia, 16c. per. bush.;" in that issued to Elmendorf & Co., "rates from Chicago to Bound Brook and Newark, 17c. per bush.;" and in that issued to Gilbert, Wolcott & Co., was the clause, "rates from Chicago to Tamaqua, Pa., corn 17c. oats 11c. bush." Each of these bills contained these further clauses: "That the said Anchor Line and the steamboats, railroad companies and forwarding lines with which it connects, and which receive said property, shall not be liable * * * for loss or damage by fire, collision or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals. And where grain is shipped in bulk, the said Anchor Line is hereby authorized to deliver the same to the Elevator Company at Erie, as the agent of the owner or consignee for trans-shipment (but without further charge to such owner or consignee), into the cars of the connecting railroad companies or forwarding lines, and when so transhipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss either in quantity or weight, and shall be entitled to all the other exemptions and conditions herein contained. It is further stipulated and agreed, that in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsi-

bility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

On the day of shipment the libellant through its agent in Chicago, made an insurance on the consignment to Wright & Co., of $8,000, on that to Elmendorf & Co., of $520, and on that to Gilbert, Wolcott & Co., of $700.

The Merchant laden with the grain covered by these bills of lading, left the port of Chicago July 24th, and proceeded on her voyage to Erie. Having reached a point about ten miles south of Milwaukee, she was on the next day at about nine o'clock in the morning, stranded in a fog on the west shore of Lake Michigan. By reason of this event there was a total loss to the shippers of these several shipments of grain. Notices of abandonment were given to the insurance company, and on claim made, libellant paid to the several shippers the amounts of insurance on their respective shipments as and for a total loss.

The libel alleged that these shipments of grain were placed on board the Merchant, to be carried to Erie and there delivered for the shippers for transhipment; that the loss did not occur by reason of fire, collision or the dangers of navigation, but was occasioned by the unseaworthiness of the vessel, and unskilfulness, carelessness and negligence in her conduct and management while on her voyage; and that by payment of the insurance on said shipments, libellant became subrogated to all the rights, interests and rights of action of the assured against the carrier. It was also alleged that these shipments of grain were in fact wholly lost, except about 5,188 bushels, which quantity was brought into the port of Milwaukee in a perishable condition, and unfit for trans-shipment, and was sold by respondent for $1,037.60.

The suit being *in personam*, and the respondent being a

corporation of another State, service was obtained by process of attachment levied upon a vessel of the Anchor Line, found within the jurisdiction of the court as authorized by the rules in admiralty.

The answer put the libellant upon proof of various allegations in the libel, and denied that the loss was occasioned by unseaworthiness of the propeller, or the unskilfulness, mismanagement, carelessness or negligence of respondent, or of any of its officers, agents or servants. It is alleged that the propeller was seaworthy, and that the loss occurred by a peril of navigation without any fault of the vessel, or any fault, negligence or want of skill on the part of those in charge of her.

As an affirmative defense it was alleged that at the time of the loss, the grain covered by the bills of lading was in the actual custody of the respondent, which was the carrier thereof, and that if any liability arose on account of the loss, which is denied, respondent was the company and carrier alone answerable therefor, and, therefore, that by the provisions of the bills of lading, respondent became entitled to the full benefit of the insurance on the grain; and so, that no action could be maintained by libellant against respondent on account of the loss.

A further defense interposed was that the court had no jurisdiction of the subject-matter of this action; and the ground of this defense was that by the bills of lading the grain in question was to be transported by respondent by boat, railway companies and forwarding lines to points and places in the States of Pennsylvania and New Jersey, viz: Philadelphia, Tamaqua, Bound Brook and Newark; that it was understood and agreed by the parties that part of the transportation should be performed on land and by means of railroad cars, and that, therefore, the alleged causes of action set out in the libel were not causes of admirality jurisdiction.

Van Dyke & Van Dyke and *Emmons* for libellant; *Lynde* and *Hibbard* for respondent.

DYER, J.:

Upon the issues made by the pleadings, three questions arise which were very fully and ably argued at the bar, as the principal questions in the case.

1. Has the court jurisdiction of the subject-matter of this action.

2. If the court has jurisdiction and the case is to be considered on its merits, was the loss occasioned solely by a peril of navigation, or by the unseaworthiness of the vessel or the negligence and unskilfulness of those in charge of her, either in connection with or in the absence of such peril?

3. Is the respondent entitled to the benefit of the insurance in this case.

[The court decided the question of jurisdiction in the affirmative.]

* * * * * * * *

Second: To what was the standing of the propeller attributable? Did it arise solely from a peril of navigation, or was there co-operating negligence?

[Upon a review of the facts which this question involved, it was held by the court that there was negligence on the part of the master and mariners who were navigating the vessel at the time, and that although a peril of navigation was the proximate cause of the loss, the remote cause was such negligence.]

Third: The last and more difficult and interesting question remains to be considered, namely: Is the respondent entitled to the benefit of the insurance in this case?

The various grounds upon which libellant urges its right to recover are:

1. That the loss in question was occasioned by the negligence of the carrier; that, therefore, the shippers had a right of action against the carrier; notwithstanding the stipulations in the bills of lading limiting its liability; that the insurance company having paid the amount of the losses to the shippers, became subrogated to their rights, and may,

therefore, maintain its action against the carrier for the amount so paid, and the carrier can not avail itself of the clause in the bills of lading giving to it the benefit of the insurance, the loss having resulted from its own negligence.

2. That it is not proven that the shippers affirmatively assented to the limitations of liability and special provisions contained in the bills of lading, and hence that such liabilities and provisions are not part of the contracts of shipments.

3. That the clauses in the bills of lading limiting liability, including the provision in question, are wholly void because of a statute of the State of Illinois where the contracts were made, which makes it unlawful for a common carrier to limit its common law liability safely to deliver property by any stipulation or limitation expressed in the receipt given for such property.

The principal propositions urged in reply by respondent are:

1. That it clearly appears from the proofs that the bills of lading with all the clauses and stipulations which they contain constituted the contracts between the carrier and the shipper under which the grain was shipped.

2. That the statute of Illinois referred to does not apply to bills of lading issued on account of shipments as in this case, and that in any event it is not controlling upon this court, the question involved being one of general commercial law.

3. That the stipulation giving to the carrier the benefit of insurance is valid, even though the carrier can not relieve itself from the consequence of its own negligence; that whether the losses in question arose from negligence or not, after the insurance company made payment to the shippers, they, the shippers, had no right of action against the carrier; that, therefore, there was no right to which libellant could be subrogated, and as a consequence that no action will lie against respondent; in other words that the stipulation in question displaced or destroyed the right which

might otherwise exist of the insurance company on payment of the insurance to proceed against the carrier for reimbursement.

Without going at large into the proofs upon the question it will suffice to say that I think the bills of lading should be regarded as the contracts between the shippers and the carrier under which the grain was shipped. It is true that the decisions in Illinois enunciate a very strict rule in relation to proof of affirmative assent to special conditions in such contracts — a rule much stricter than is laid down by the Supreme Court of this State and other courts. But the proofs here are very satisfactory as to the shippers' understanding and knowledge of the character and contents of these bills of lading and as to their acceptance of them with such knowledge of their character. The case is much stronger in that regard upon the facts than *Railroad Company v. Manufacturing Company*,[1] in which it was held that an unsigned general notice printed on the back of the receipt does not amount to a special contract limiting the common law liability, though the receipt with such notice on it may have been taken without dissent. In this State it has been held that when such a contract is shown in the custody of the shipper its due delivery and his assent to its terms are to be presumed, and that the burden is upon him to obviate these presumptions by proof. But it is not, I think, necessary to go thus far in order to sustain these bills of lading as contracts assented to by the shippers. By affirmative evidence it is sufficiently shown that they were understood and accepted as the contracts under which the shipments were made; and what transpired between the shippers and the agent of the carrier prior to the delivery on board of the grain and the execution of the bills of lading were evidently understood by the parties as only the usual preliminary negotiations and understanding in relation to the shipments which were to be followed by consummated contracts in the form of bills of lading.

[1] 16 Wall. 318 (1872).

There has been much controversy in the courts as to the power of a common carrier to limit his common law liability by special contract. Since the cases of *New Jersey Steam Navigation Company v. Merchants Bank*[2] and *York Company v. Central Railroad*,[3] the question dealt with independently of statutory regulation has not been an open one in the Federal courts; and the right of the carrier to restrict or diminish his general liability by special contract has been re-affirmed in *Railroad Company v. Manufacturing Company*[4] and in *Bank of Kentucky v. Adams Express Company*.[5] It is equally well settled that a common carrier can not lawfully stipulate for exemption from responsibility for the misconduct or negligence of himself or his servants.[6]

Upon a finding of negligence in navigating the vessel. follows, therefore, in the case at bar that the owners of the cargo could have recovered against the carrier notwithstanding the limitations of liability expressed in the bills of lading. An insurer of goods lost while in course of transportation by a common carrier is entitled after payment of the loss to recover what he has paid by suit against the carrier. No right, in the absence of special contract to the contrary, is better established. The legal principles upon which this right rests are most clearly stated in *Hall v. Railroad Companies*,[7] by Mr. Justice STRONG, who says: "It is too well settled by the authorities to admit of question that as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of

[2] 6 How. 344 (1848).
[3] 3 Wall. 107 (1865).
[4] 16 Wall. 318 (1872).
[5] 93 U. S. 174, 4 Cent. L. J. 35 (1876).
[6] Railroad Co. v. Lockwood, 17 Wall. 357 (1873); Bank of Kentucky v. Adams Express Co., *supra*.
[7] 13 Wall. 367 (1871).

the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract but worked out through the right of the creditor or owner."

In *Hart v. Western Railroad Corporation*,[8] SHAW, C. J., states the principles as follows: "Now, when the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity which he holds for the common benefit to the insurer. It is one and the same loss for which he has a claim of indemnity and he can equitably receive but one satisfaction. So that if the assured first applies to the railroad company and receives the damages provided, it diminishes his loss *pro tanto* by a deduction from and growing out of a legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is in legal effect first and

[8] 13 Met. 99 (1847).

principal, and that of the insurer secondary; not in order of time but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases—to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company who pays him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance, to wit: the building insured, and his claim is for the balance. And it follows as a necessary consequence that if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee and his equitable interest will be protected."

Now, were it not for the stipulation contained in the bills of lading giving to the carrier the benefit of the insurance, there would be no question of libellant's right to recover. And the precise point of inquiry is what is the effect of that stipulation?

The "perils" insured against were generally "of the seas," and after enumerating various specific perils, such as fires, enemies, jettisons, pirates and the like, the policy provides that the insurance company "takes upon itself all other perils, losses and misfortunes that * * * shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof."

The question under consideration was to a great extent argued by the learned counsel for libellant, upon the theory that to give to the carrier the benefit of the provision relating to insurance, would be to give effect to the limitation of its common law liability for the grain and its safe delivery contained in the bills of lading, even as against the carrier's own negligence. I do not perceive a necessary connection between the clause in the bills of lading limiting

liability for a safe delivery of the cargo, and the clause giving to the carrier the benefit of the insurance, not that it follows that because the former can not exonerate itself from liability for negligence, the latter clause may not be held valid. To give the carrier the benefit of the insurance it must be liable to the shipper for the loss. Liability must exist as a pre-requisite to a claim to the insurance. The agreement is that if the carrier shall be liable for the loss then he shall have the benefit of the insurance. And if it be correct to say that the validity of the stipulation relative to insurance is not dependent upon the validity of the clause which attempts to limit liability for the property, or in other words that the effect of the stipulation relating to insurance is not to defeat the obligation of the carrier to indemnify the owner against loss occasioned by its negligence, then it would seem that the Illinois statute does not bear upon the right of the carrier to contract with the shipper for the benefit of the insurance. That statute provides: "Whenever any property is received by a common carrier to be transported from one place to another within or without this State, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported by any stipulation or limitation expressed in the receipt given for such property."

As will be observed, the prohibition here is against any limitation of common law liability safely to deliver the property; and this does not involve the right to stipulate for the benefit of the insurance in case of loss and liability. These clauses in the bills of lading are to be read as the application to them of legal principles requires, and so reading them, the provisions would in terms be that the carrier "shall not be liable * * * for loss or damage by fire, collision or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals," unless such loss or damage shall be occasioned by the negligence of said Anchor Line, its agents or servants. And, "in case of any loss, detri-

ment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, * * * the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.'"

Admitting then that the loss of the cargo resulted remotely from the negligence of the carrier, the question recurs, can that part of the contract which gives to the carrier the benefit of the insurance be enforced as a valid agreement? In the absence of such agreement, on payment of the whole loss by the insurer, the insured would hold their claim against the carrier in trust for the insurer. And if the agreement be valid, I think it follows that on payment of the loss by the carrier, the insured would hold their claim against the insurer in trust for the carrier; and further, with this agreement in force on payment of the loss by the insurer, the insured would have no right to go against the carrier, because the loss would be satisfied with moneys to which the carrier, as between it and the insured would be entitled. It is settled by controlling authority that a common carrier has an insurable interest in the goods he carries, and can contract for the benefit of insurance effected by the owner.[9] In *Savage v. Corn Exchange Insurance Company*,[10] it was held that a common carrier being bound to make safe delivery of goods at the place of destination, such obligation together with his claim for advances and freight, give him an insurable interest to the extent of the fair value of the property insured. Coming then directly to the point in issue, a test of the validity of this stipulation would seem to be, could the carrier recover for a loss happening confessedly through his negligence upon a contract of insurance, insuring against "perils of the sea?"

[9] Van Natta v. Mut. Sec. Ins. Co., 2 Sandf. 490 (1849); Chase v. Washington Mut. Ins. Co., 12 Barb. 595 (1852); Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173 (1859); 2 Parsons on Ins. 200.

[10] 36 N. Y. 655 (1867).

Upon this question counsel for libellant lay down the proposition, that negligence of a carrier or ship owner, if it can be insured against at all, must be made the subject-matter of express contract, which can not admit of a reasonable doubt. Formerly, this was a vexed question in the courts, but it is now fully and firmly settled by both English and American decisions, that a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners.[11]

In *General Mutual Insurance Company v. Sherwood*,[12] it was held that damages decreed by a court of admiralty to be a lien on the vessel insured, by reason of a collision produced by the negligence of those who navigated that vessel, can not be recovered under a policy insuring against the usual perils and including barratry. The facts were peculiar. The plaintiffs in the action were the owners of a brig. Through the negligence of the master and mariners of the brig, another vessel was injured. In proceedings on the part of the injured vessel, the brig and her owners were adjudged liable for the damages and the decree pronounced the collision to have occurred in consequence of the negligence. On payment of the decree, the owners of the brig sued the insurance company on a time policy, and set up the facts expressly alleging the negligence as the reason why they had paid the damages, and it was held they could not recover. It was, therefore, not the case of the insurers going behind the cause of loss and defending, by showing this cause was produced by negligence, which Mr. Justice CURTIS says could not be done, but it was the case of the insured himself going behind the collision and showing as the sole reason why he had paid the loss, the negligence of his own servants and agents.

[11] Patapsco Ins. Co. v. Coulter, 3 Pet. 222 (1830); Columbia Ins. Co. v. Lawrence, 10 Pet. 507 (1836); General Mut. Ins. Co. v. Sherwood, 14 How. 351 (1852); Copeland v. New England Marine Ins. Co., 2 Metc. 432 (1841), and cases cited in these decisions.

[12] 14 How. 351 (1852).

In *Copeland v. New England Marine Insurance Company*,[12] SHAW, C. J., in a very exhaustive opinion, containing a lengthy review of the authorities, held that "a vessel which is insured on a voyage out and home, and which departs with officers and a crew competent for the voyage, does not become unseaworthy by reason of the master's becoming incompetent, at the foreign port, to command the vessel; and if the vessel sails from such port under his command and is lost on the homeward passage, the underwriters are not discharged, although the loss may have been caused by the master's incapacity. And although, in such case of the master's incompetency, it is the duty of the mate to take command of the vessel, and although he has a right to resort to all lawful means to establish himself in the command; yet if from want of judgment or even from culpable negligence, he omits so to do, and the vessel sails under the master's command and is stranded, the underwriters are not discharged." And in the opinion there is this enunciation of the law which is specially pertinent: "It is very clear in this case that the immediate cause of the loss was stranding in the night time, which is one of the perils insured against; and the case supposed is that this was occasioned by the default of the mate in not assuming the command. This default must consist either in a want of judgment in perceiving and determining that the master had become so incapacitated as to authorize and require him to interpose, or in negligence in the performance of his duty, when the case occurred. Such a case may occur in every voyage, and must be considered as one of the contingencies incident to navigation. It may often present questions of great difficulty, in acting on which mistakes on the part of the officer second in command may occur. But we can not perceive why the duty of the mate was not of a purely official and professional character, growing out of his powers and the relation in which he stood as an officer, and not devolving on him as the agent of the owners in any

[12] 2 Metc. 432 (1841).

other sense than that in which pilots and all other officers and mariners are their agents. They are vested with certain powers to be exercised for the use and benefit of owners, freighters, underwriters and all others who are directly or remotely interested in the vessel and voyage. I can not distinguish the negligence of the mate in the case supposed from his failure in the performance of any other duty as a nautical man. Suppose a case of a loss by stranding, and it could be satisfactorily proved that if in a particular emergency sail had been made or taken in, if an anchor had been carried out or the vessel put on another tack, the disaster might have been avoided; it would indicate a similar mistake of judgment or neglect of duty on the part of the commanding officer as that in the case supposed. In both cases it is a mistake or neglect of his peculiar and appropriate duty as an officer and seaman. For the performance of these duties we are of opinion that the owners, as between themselves and the underwriters, are not responsible. A contrary doctrine would lead to questions of great difficulty, involving numerous questions of fact of very difficult proof, as to the skill and seamanship of all the nautical measures taken in the whole conduct of the voyage. Besides, these mistakes of judgment and instances of negligence are incident to navigation and constitute a part of the perils that attend it; and they can no more be restrained, prevented or guarded against by the owners than by the underwriters. The most cautious foresight can only enable owners to provide a competent crew of officers and seamen at the commencement of the voyage. What reasons, then, are there of justice or policy; what considerations growing out of the nature of this contract or the relations of the parties, which should prevent the owners from insuring themselves against this peril?"

Stranding is a "peril of the sea." In the case at bar the stranding of the vessel was the proximate cause of the loss. The remote cause was the negligence of the master and mariners in navigating the vessel. The law being as

stated, it follows that if the case were that of insurance in favor of the carrier against perils of the sea, the insurer could not go behind the proximate cause of the loss and defeat a recovery by showing the negligence of the master and crew of the vessel. We have then this state of the case: The carrier made itself liable for the loss of the cargo by a peril of the sea, if negligence co-operated in causing the loss. The owners of the cargo contracted with the carrier that if loss should occur for which liability arose, the carrier should have the benefit of any insurance on the property. The shippers then contracted for insurance against the usual perils. There was a loss for which the carrier was primarily liable to the shippers. The proximate cause of the loss was a peril of the sea. It was a loss, therefore, which the carrier could directly insure against, and the fact that its remote cause was negligence would not relieve the insurer. Why could not the carrier secure by the indirect way of a contract with the shippers, in case of its liability for a loss, the benefit of their insurance, if it could by direct contract with the insurer have obtained indemnity against loss caused proximately by a peril insured against, but remotely by its own negligence? If it be said that the rights of the insurance company ought not to be affected by a contract between the shipper and the carrier, I think it may be answered that the company put itself in privity with such contract by its contract of insurance while the property was in transit, and that it dealt with the insured property, subject to the terms of the bills of lading, which gave to the carrier the benefit of the insurance in case of loss for which the carrier should be liable. The case does not show that any fraud was intended by the carrier in making this stipulation with the shippers. The agent of the insurance company was also the agent of the carrier, and the same person issued the certificate of insurance and made the contracts of shipment with the shippers. And in the light of all the facts and the legal principles which I have endeavored to state, I can not bring my mind to any other conclu-

sion than that this was a lawful and valid contract. If this be so, then upon receiving payment for their losses from the insurer, the right of the insured to proceed against the carrier was determined, and no such right remained to which the insurer could be subrogated, because necessarily the insurer must take the rights of the owners of the cargo subject to all agreements and equities between the insured and the carrier.[14]

In the case last cited the Court of Appeals of New York held that a common carrier may by contract with the owners secure to himself in case of damage or loss to the goods for which the carrier would be liable the benefit of any insurance to be effected by the owner, and that this abandonment to the insurer against marine perils of goods damaged during their transportation under such a contract, and payment of the loss, does not give to the insurer any right of action against the carrier.

This case was much criticized upon the argument, but I do not see why upon principle it is not sound. It is true that the case did not present the element of negligence on the part of the carrier, and the court alludes to this fact in the opinion; but I think only for the purpose of calling attention to the point that not even primary liability of the carrier for the loss of the goods was in that case shown. But a careful reading of the opinion, I think, shows that even though such liability were established by direct proof of negligence, it was the view of the court that the contract was valid; for after alluding to the absence of the element of negligence the opinion proceeds: "But it is enough that the plaintiffs took the rights of the owner of the goods subject to all agreements and equities between the insured and defendants, and that the contract between them being valid protects the latter against a recovery by the plaintiff."

In conclusion I must hold that the provision in the bills of lading giving to the carrier the benefit of insurance on the

[14] Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173 (1859).

property was valid, and that no right of subrogation accrued to libellant, since the insured on payment to them of the insurance had no right of action against the carrier.

Upon the *first* propcsition of the *syllabus* in the foregoing case, see *ante*, §§ 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 132, 214.

Upon the *second* proposition of the *syllabus*, see *ante*, §§ 38, 88, 104.

Upon the *third* and *fourth* propositions of the *syllabus*, see *ante*, § 124.

Upon the *fifth*, *sixth* and *seventh* propositions of the *syllabus*, see *ante*, § 153.

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§ 256. — COMMON CARRIERS BY WATER — EXCEPTIONS OF "PERILS OF THE SEA" — "LEAKAGE, BREAKAGE OR RUST" — NEGLIGENCE — BURDEN OF PROOF.

RICHARDS v. HANSEN.

United States Circuit Court, District of Massachusetts, November, 1879.

Before Mr. Justice CLIFFORD.

1. Carriers of goods by water are as much insurers of the goods they transport as common carriers by land, and are subject to the same liabilities.
2. A carrier is not released from liability for damage to a cargo by water where it appears that the construction of the ship rendered her unfit to transport such a cargo at that season of the year, and that her ceilings were insufficient, even though the bill of lading expressly excepts the "perils of the seas."
3. The exception in a bill of lading of liability for "leakage, breakage and rust," will excuse rust caused by the sweat or moisture of the place where the goods are stowed. But it will not excuse rust arising from the entrance of water through an insufficient ceiling in the ship.
4. The burden of proof is upon the carrier to show that the loss was within one of the excepted perils.

Mr. Justice CLIFFORD:

Carriers of goods, if common carriers, contract for the safe custody, due transport and right delivery of the same,

and in the absence of any legislative regulation prescribing a different rule, are insurers of the goods, and are liable at all events and for every loss or damage, unless it happened by the act of God, or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without any fault or negligence on the part of the carrier.[15] Ship owners and masters of the ships employed as general ships in the coasting or foreign trade, or in general freighting business, are deemed common carriers by water, and as such are as much insurers of the goods they transport as common carriers by land, unless it is otherwise provided in the bill of lading.[16] Such a carrier's first duty, and one implied by law, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails or other motive power, as the case may be, and furniture necessary for the voyage. Vessels so employed must also be provided with a crew adequate in number and sufficient and competent to perform the required duty, and with a competent and skilful master of sound judgment and discretion. Owners in such cases must see to it that the master is well qualified for his situation, as they are directly responsible for his negligences and unskilfulness in the performance of his duty. In the absence of any special agreement to the contrary, the duty of the master extends to all that relates to the lading and stowage of the cargo as well as to the transportation and delivery of the goods, and for the performance of all those duties the ship is liable as well as the master and owners.[17]

Goods of great value, consisting of sheet iron in bundles, were shipped by the libellants in the steamer Svend, bound on a voyage from the port of Liverpool to the port of Boston. By the manifest it appears that the steamer was an iron propeller, carrying general cargo for freight, and that

[15] The Niagara v. Cordes, 21 How. 7 (1858).

[16] Story on Bailments (7th ed.) 501.

[17] Elliott v. Rossell, 10 Johns, 1 (1813); King v. Shepherd, 3 Story, 349 (1844).

the shipment belonged to various persons, which of itself is sufficient to show that the master and owners were common carriers in the strictest sense. Sufficient also appears to show that the goods when shipped were in good order and condition, and that the covenant of the bill of lading is that they shall be delivered in like good order and condition. One thousand bundles of the shipment, stowed in the forward part of the aft lower hold, were badly wet with salt water to such an extent that when the bundles were hoisted out to be delivered, the water dripped out of the same and appeared muddy with rust. Damages are claimed by the libellants, in the libel as amended, for breach of the contract to deliver the goods in the condition specified in the bill of lading in the sum of four thousand dollars, and the evidence shows that the goods shipped were injured in the manner charged to an amount even greater than that alleged in the libel.

Compensation for the injury is claimed by the libellants upon the following grounds: — 1. Because the evidence proves to a demonstration that the goods were shipped in good order and condition, and that the respondents have failed to show that the injuries to the goods resulted from the excepted perils, or any of them, or from the fault of the shipper. 2. Because the steamer was unseaworthy in that she was not of a construction suitable to carry such a cargo on such a voyage at that season of the year. 3. Because the ceiling of the steamer was not of a suitable character nor fit to protect such cargo from salt water on the described voyage. 4. That the goods injured were not properly stowed or dunnaged for their protection against injuries of the kind on such a voyage.

Two points are not controverted in argument by the respondents: — 1. That the goods were in good order and condition when shipped. 2. That the quantity mentioned in the libel was injured in the course of the voyage, and that it was not in good order and condition when delivered.

Conceded or not, the evidence to the effect is satisfactory

and conclusive, but the respondents explicitly deny every other proposition submitted by the libellants, and insist as follows: —1. That the burden of proof is upon the libellants to prove that the injury to the goods did not result from the excepted perils. 2. That the steamer was in all respects seaworthy, and of suitable construction and equipment to transport such a cargo on such a voyage at that season of the year. 3. That the ceiling of the ship was sufficient, and that the goods were properly stowed and dunnaged.

Hearing was had in the District Court, and the District Court entered a decree dismissing the libel, from which decree the libellants appealed to this court. Since the appeal was entered here more than sixty witnesses have been examined by the parties, which renders it necessary to review all the findings of the court below, as well as the legal principles applied in disposing of the case.

Due shipment of the goods is not denied, nor is it controverted that the steamer sailed from Liverpool, March 24, 1873, and that she arrived at Boston, her port of destination, April 14, in the same year. Certain exceptions are contained in the bill of lading. At the time of the voyage the steamer was comparatively a new vessel, it appearing that she was built in October of the previous year. Competent expert witnesses in great numbers describe the construction of the steamer under deck as low-waisted forward of the poop, and express the opinion that she was unfit to make such a voyage during the winter months. They were asked to give the reasons for that conclusion, and answered to the effect that in such a construction as that described the tendency in rough weather would be to fill the waist with water, and to cause the vessel to strain and roll deep and heavy. When asked what effect the straining of the vessel would have upon her ceiling in the lower hold, the answer was that if the vessel labored heavily it would cause her to blow, that the deeper the ship rolls the higher she will blow the water in her bilge, particularly if her ceiling is not water tight. Sheet-iron, all agree, is quite susceptible to damage

from being wet, and some of the expert witnesses testify that a drop of sea-water will damage a sheet of the iron and that it would take very little water to go through a whole package of such merchandise. Apart from the construction of the steamer, including her ceiling, no attempt is made to show that she was unseaworthy. Beyond doubt she was comparatively new, and was staunch and strong. Nor is it pretended that the damage to the cargo resulted from any defects in the hull of the vessel or in her equipments, beyond what was embraced in the charge that her construction in the particulars mentioned exposed the vessel to unusual strain in bad weather, and tended to make her roll unusually deep and heavy. Argument to show that the vessel when she rolls deep and heavy is more likely to blow and expose cargo stowed in her aft lower hold to wet, is quite unnecessary, as the conclusion accords with all experience, and is fully established in this case by the evidence, unless the ceiling of the ship is water tight. Owners of vessels of such a construction, even though they are seaworthy in the general sense, are bound to furnish such appliances for the protection of the cargo so stowed as will protect it from injury arising from the ordinary perils of navigation. Damage to cargo occasioned by salt water does not come within the excepted perils, when by reason of the place in which it is stowed it is exceptionally liable to such injury in severe weather.[18] Shipowners, by such a bill of lading, contract for safe custody, due transport and right delivery of the goods in like good order and condition as when they were shipped; and it is universally admitted that the contract implies that the ship is reasonably fit and suitable for the service which the owner engages to perform; that she is and shall continue to be in a condition to encounter whatever perils of the sea a ship of the kind laden in that way may be fairly expected to encounter in the contemplated voyage. Safe custody is a part of the contract, and if in consequence of the peculiar construction of the ship, further

[18] The Oquendo, 38 L. T. (N. S.) 151.

appliances are necessary to protect the cargo from injury by ordinary perils not excepted in the bill of lading, the duty of the owner is to furnish all such; and if he fails to do so, he is responsible for the consequences.[19] Explicit exceptions may excuse imperfections of construction or repairs, but in the absence of express words to the contrary, a bill of lading in the usual form implies a warranty of seaworthiness when the voyage begins, and all the exceptions in it must, unless otherwise expressed, be taken to refer to a period subsequent to the sailing of the ship with the cargo on board. As for example: Wheat was shipped at New York for Scotland, under a bill of lading excepting perils of the seas, however caused. During the voyage the wheat was damaged by sea-water. In an action by the holders of the bill of lading against the owners of the ship, the jury having found that the water obtained access to the cargo in consequence of one of the ports being insufficiently fastened, the subordinate court entered a verdict for the shipowners, upon the ground that the loss was covered by the exception in the bill of lading. But the House of Lords, on appeal, reversed the judgment, and held that as in order to bring the loss within the exceptions it must be found that the ship sailed from the port in a seaworthy state, a new trial must be had, it not appearing that the fact had been found by the jury.[20]

Two defects are suggested in the steamer, both of which if they be defects, existed at the time the ship sailed:— 1. That the construction of the ship, as already explained, rendered her unfit to transport such a cargo on such a voyage at that season of the year. 2. That the ceiling of the ship, in view of her peculiar construction, was not sufficient to protect such cargo from damage by salt water in such a voyage during the winter months of the year, when rough weather may reasonably be expected.

[19] The Marathon, 40 L. T. (N. S.) 163.

[20] Steel v. State Line Steam. Co., 37 L. T. (N. S.) 333; Lyon v. Mells, 5 East, 428 (1804).

Rough weather, as all experience shows, may be expected on such a voyage in the winter and early spring months of the year, but the respondents deny that the construction of the steamer rendered her unfit to transport such goods on such a voyage, and insist that her ceiling was properly constructed and sufficient to protect such cargo in the place where it was stowed from damage by salt water, and from every peril within the contract of the bill of lading. When built the steamer was ceiled with a permanent ceiling up to her deck. It is claimed by the respondents that she had during the voyage in addition to that, a temporary ceiling up to the turn of the bilge, but the evidence taken as a whole does not sustain that theory of fact. Even the master testifies that "she was ceiled all the way up to the deck," but he says nothing about any such additional temporary ceiling as that supposed by the respondents. Surveyors examined the steamer in New York, and one of them speaks of the vessel as ceiled to the deck, but makes no mention of any temporary ceiling of any kind. Proof that the steamer had no such ceiling is also derived from the statement of the consignee, who testifies that he went down into her hold after she was discharged, and he states that she was ceiled from the keelson entirely up to the deck. Nor does he say a word about any additional ceiling. Ships carrying grain frequently have what is called a grain ceiling in addition to the ordinary permanent ceiling, which usually extends only to the upper turn of the bilge. Unlike that a grain ceiling is a temporary appliance built up as dunnage to keep the grain removed from the permanent ceiling. Support to the theory of the respondents that the steamer had such temporary ceiling for the protection of the cargo in question is derived chiefly from the testimony of the head stevedore who superintended the discharge of the cargo, and the fact that the steamer on her former voyage from Odessa to Falmouth for orders carried a cargo of wheat which was delivered without injury.

Beyond all doubt the evidence shows that the damage was

caused by salt water which came in contact with the bundles of sheet iron as they lay stowed in the aft lower hold; and it is equally clear that the water must have reached the iron in large quantities to have caused such extensive damage to one thousand bundles of the iron, estimated to weigh fifty-five tons. Cargo stowed in the same hold above the bundles of sheet iron came out in good condition; and the witnesses for the respondents agree that there had been no leakage through the hatches, from which it would seem to follow that the water must have come from below. Confirmation of that view of a persuasive character is derived from the testimony of the master, who in direct terms attributes the damage to the blowing of bilge water through the seams of the ceiling in the after hold when the steamer rolled. Cogent support to that theory is also derived from the testimony of the mate, who expresses the opinion that it was caused by the ship laboring so heavily and rolling. Convincing confirmation of that theory, if more be needed, is also found in the testimony of port warden, Paine, who testified that when he went down into the after hold he did not see anything that denoted a leak, and he expressed the opinion that it must have been done by what is called "blowing," that is, that the bilge water swashes up when the ship rolls, and he added that it is a common thing for bilge water to blow up when the ship labors, as explained, and that it does not take much water to damage sheet iron. Few steamers have their ceilings caulked so as to be water tight, and in all cases where they do not it seems that the blowing of bilge water through the seams of the ceiling is a common occurrence when the vessel rolls.

Steamers, as well as sail ships, roll more or less on every such voyage, varying in degree with the state of the wind, the construction of the vessel, the manner in which she is loaded, and the means by which she is propelled. Even suppose that cases may arise where it would properly be held that blowing is a "peril of navigation," within such an exception in a bill of lading, it is clear that such a

rule can not be applied in this case as it appears that the goods might have been protected from such damage by reasonable foresight, care and prudence, the rule being that the carrier ought to take adequate measures to protect the cargo against a common and ordinary occurrence which might and ought to have been foreseen.[21] "Dangers of the seas," said Judge STORY, whether understood in its most limited sense as importing only a loss by the natural accidents peculiar to that element, or whether understood in its most extended sense as including inevitable accidents upon that element, must still in either case be clearly understood to include only such losses as are of an extraordinary nature, or arise from such irresistible force or some overwhelming power which can not be guarded against by the ordinary exertions of human skill and prudence.[22] Hence it is that if the loss occurred by a "peril of the sea" that might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the "perils of the sea" as will exempt the carrier from liability.[23]

Both parties agree that the steamer was well built, and that in the general sense she was seaworthy when the voyage began and when it ended at the port of destination, the only defect alleged by the libellants being that in consequence of her peculiar construction and the insufficiency of her ceiling and dunnage she was unfit to carry sheet iron stowed in her aft lower hold on such a voyage during the winter and early spring months of the year; and the court is of the opinion that the great weight of the evidence fully sustains that proposition. It may be that the steamer would have been a fit and proper vessel to carry such cargo on such voyage in a milder season of the year, or that she would have been a fit and proper vessel for the voyage in

[21] Bearse v. Ropes, 1 Sprague, 331 (1856).

[22] The Reeside, 2 Sum. 567 (1837).

[23] Nugent v. Smith, L. R. 1 C. P. Div. 423 (1875); Story on Bailments, 7th ed., § 512; 3 Kent's Com. (12th ed.) 217.

question if her ceiling had been water tight, or if the sheet iron had been stowed between decks, but it is very clear in the judgment of the court, that the construction and defective ceiling of the steamer, taken in connection with the place and manner of stowage, rendered her unfit to transport such goods on such a voyage at that season of the year. By the terms of the bill of lading safe custody is as much a part of the contract of the carrier as due transport and right delivery. When shipped the sheet iron was in good order and condition, and when delivered it was badly damaged by salt water, the evidence showing to the satisfaction of the court that the water obtained access to the goods through the seams or crevices in the ceiling of the steamer.

Evidence of leakage is not exhibited in the record, and inasmuch as it is proved that the cargo stowed above the iron in the same hold came out dry, it seems clear almost to a demonstration, that if the ceiling had been water-tight no such damage would have been occasioned, and that the swashing of the bilge-water between the sides of the vessel and the ceiling would not have caused it to reach the sheet iron, though stowed in the aft lower hold. Where goods are shipped and the usual bill of lading given promising to deliver the same in good order, the dangers of the seas excepted without more, and they are found to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was occasioned by one of the excepted perils.[24] Reported cases, however, may be found where it is held that if an excepted peril is shown which is adequate to have occasioned the loss, the burden of proof shifts, and that the shipper in such a case is required to show that it was not occasioned by that peril but by some negligence of the carrier which rendered that peril efficient, or co-operated with it, or brought it about without any connection with the sea peril.[25]

[24] Clark v. Barnwell, 12 How. 272 (1851); Story on Bailments (7th ed.) § 529; Nelson v. Woodruff, 1 Black, 156 (1861).

[25] The Invincible, 1 Lowell, 225 (1868); The Lexington, 6 How. 344 (1848).

Such ship owners carrying goods under a bill of lading by which they contract to deliver the goods in good order and condition, certain perils excepted, are bound to deliver the same in that condition unless prevented by those perils, and are responsible for any damage to the goods occasioned otherwise than by those perils.[26] Three marine surveyors examined the steamer after her return, and concur in the opinion that she was not fit for such a voyage at that season, in view of her construction and consequent tendency to roll and produce blowing in a heavy sea, and many other witnesses are of the same opinion. Her internal construction was such that bilge water could blow into the hold through the seams of her ceiling when she rolled, it appearing that her ceiling was built upon the ribs of the ship, beginning at the keelson, only fourteen inches above her iron bottom, and that it continued all the way up to her main deck, being only about four inches away from her iron sides, which shows that bilge water might rush up between the ceiling and her iron sides whenever the shipped rolled, as there is no evidence to show that the seams of the ceiling were caulked or pitched before she sailed, or at any time during the voyage. Defects of the kind might easily have been remedied before the voyage began, or at any time during its progress; but it does not appear that any attempt was made to apply any of the known remedies for such defects. Stowage in the lower hold may be a fit place even for such a cargo in a steamer of a different construction, and doubtless might have been in the steamer of the libellants if the ceiling had been water-tight, or if proper means had been devised and applied to prevent the blige water when the vessel rolled from blowing or escaping through the seams of the ceiling and finding access to the sheet iron as stowed in the hold. Suitable appliances, it is not doubted, would have prevented such consequences, and protected the cargo from damage. Nothing of the kind was done or attempted, and in view of the exposed condition of the cargo

[26] The Chasca, L. R. 4 Adm. 446, 32 L. T. (N. S.) 838 (1875).

from the causes shown, the conclusion must be that the place where the same was stowed was an unfit place in that steamer for stowing such cargo on such a voyage at that season of the year.

Defenses of various kinds are set up in argument, of which the two principal ones deserve to be specially examined. 1. That the bill of lading excepts leakage, breakage and rust; the language of the instrument being "not answerable for leakage, breakage or rust." 2. That the damage was caused by the "perils of the seas," within the meaning of the bill of lading.

I. Two or more answers may be made to the defense arising from the said exception: — 1. It is not adequate to have occasioned the loss. Rust may be caused by sweat or mere moisture of the air in the place where goods are stowed, and it may be that the exception is adequate to cover such a loss, and in such a case to shift the burden of proof from the carrier to the shipper, to show that the loss was not occasioned by that peril. 2. Concede that, but it by no means follows that such an exception is adequate to cover the damage in this case, which arose from the profusely wetting and soaking the sheet iron in salt bilge water, blown through the seams and crevices of the ceiling on the sides of the place where the iron was stowed. Viewed in the light of the actual circumstances, it is clear that the exception is neither adequate nor sufficiently comprehensive to cover the damages occasioned by the means proved in this case. 3. Suppose, however, it may have the effect to shift the burden of proof, still it does not follow that the defense is a valid one, as it fully appears that the evidence introduced by the libellants is sufficient to overcome every presumption in favor of the carrier, and to show that the damage was occasioned by mere want of foresight, care and diligence.

II. Nor is there any better ground to support the second defence. Evidence to support the defense was introduced in the court below, consisting of the depositions of the master, mate and engineer of the steamer, and the protest filed

in the case; and those documents are exhibited in the record, together with the depositions of nineteen other witnesses taken since the appeal, of which sixteen were introduced by the libellants. Ships carrying cargoes as common carriers must be fitted to encounter ordinary sea perils on the voyage described in the contract of shipment. Injuries to cargo resulting from such perils give the shipper a right of action against the carrier, but the court below, on the evidence then exhibited, found that the gales were proved to be of extraordinary violence, and such as would have been likely to damage a seaworthy ship, and to come within the usual definition of such perils. Responsive to that, the first observation to be made is that the gales referred to did not damage the steamer of the respondents in the slightest degree worth mentioning, as appears from all the testimony exhibited as to her condition after she arrived at her port of destination. Except that the muzzle around the end of the pipe under the ceiling broke loose, there is no proof of actual damage to the steamer, and it is not claimed that the expenses of repairing that injury would amount to more than a nominal sum. Witnesses called by the respondents, especially the officers of the steamer, sustain the theory of the respondents that the gales which the steamer encountered were extraordinary, but in view of the very slight damage to the vessel, and the contradictory testimony introduced by the libellants since the appeal, the court is of the opinion that the violence of the gales was much exaggerated in the testimony of the officers as introduced in the court below.[27] Opposed to the theory of the respondents that the damage was occasioned by the extraordinary "perils of the seas," is the united testimony of the sixteen witnesses since introduced by the respondents. Suffice it to say without reproducing their testimony, that they are witnesses of great nautical experience, and that they all testify in substance and effect that the weather, even as described by the master, was not more boisterous than is usually found on that voyage at that

[27] The Oquendo, 38 L. T. (N. S.), 154.

season of the year. Eight steamers coming westward over the same route as the steamer of the respondents, starting at different times later, overtook and passed her at various points on her course, and encountered only moderate weather, and made very good passages as to time. On the other hand, steamers which left a week earlier than the steamer of the respondents, encountered severe and heavy weather, such as is to be expected and is usually experienced during the winter and early spring months. Inquiry was made of the master whether or not there was any unusual wind or weather during the voyage, and his answer was: "We had very heavy gales, sir, but I could not say it was an unusual thing to have — except at that season — being so far advanced."

Examined in the light of the whole evidence, the court is of the opinion that the respondents have failed to show that the damage was occasioned by the "perils of the seas" within the meaning of the bill of lading. Much testimony was introduced by the respective parties in regard to the dunnage of the sheet iron stowed in the lower hold. "Dunnage" usually consists of pieces of wood placed against the sides and bottom of the hold of the ship, to protect the cargo from injury by contact with the vessel or other cargo, or by leakage. Confined to that purpose, the court is of the opinion that the weight of the evidence shows that it was sufficient, but if its purpose be extended as a means to protect the cargo stowed in the hold from being wet by bilge water blown through the seams and crevices of a defective ceiling, the court is of the opinion that it was clearly insufficient to afford any such sufficient protection. Conclusive proof is exhibited that the ceiling was not water tight, and all the witnesses examined upon the subject, except the head stevedore and one of his assistants, had given evidence tending to convince the court that the salt water obtained access to the sheet iron through the ceiling. Testimony to the contrary comes chiefly from the stevedore, but his statements are so indefinite, contradictory, rash and inconsiderate, that hey fail to secure the concurrence of the court in their ac-

curacy. Beyond controversy the damage to the sheet iron was occasioned by "blowing," by which is meant that the salt bilge water found access to the iron as stowed in the forward part of the after hold, through the seams and crevices of the ceiling when the vessel rolled; from which it follows that the libellants are entitled to recover, and that the decree must be reversed. Separate findings of fact and law are required in an admiralty suit in the Circuit Court in all cases where the amount in controversy, on appeal, is sufficient to give the Supreme Court jurisdiction to re-examine the decree rendered in the Circuit Court; but where the sum or value in dispute does not exceed the sum or value of five thousand dollars, a more general finding of those matters in the opinion of the Circuit Court will be sufficient.[28]

Prior to the filing of the answer the libellants filed an amendment to the libel, increasing the *ad damnum* to four thousand dollars, and inasmuch as the respondents made no objection to the amendment it is deemed proper to regard it as having been duly allowed, as otherwise it would be allowed by this court. On June 16, 1876, the libellants asked leave to file a second count as an amendment to the libel, and the court ordered it placed on file, reserving the question of its allowance or disallowance to be decided at the final hearing. Pursuant to that order the amendment as proposed is allowed, but the additional amendment proposed at the argument further increasing the *ad damnum*, is disallowed. Evidence as to the extent of the damage is contained in the record, and in view of that fact it is not necessary to refer the cause to a commissioner to ascertain the amount, the court being satisfied that the loss exceeds even the amended *ad damnum* of the libel, which is all the court can allow under the pleadings, except for costs which have arisen through the fault of the respondents in not paying the just claim of the libellants.[29]

[28] Vitrified Pipes, 14 Blatchf. 274 (1877); 18 Stat. at Large, 215 § 1, 316, § 3.

[29] The Wanata, 95 U. S. 600 (1877).

The decree of the District Court is reversed and a decree for the libellants entered for the sum of four thousand dollars, with costs.

NOTE. — Upon the *first* proposition of the *syllabus* in the foregoing case see *ante*, §§ 1, 5, 149.

Upon the *second* proposition of the *syllabus* see *ante*, §§ 132, 165.

Upon the *third* proposition of the *syllabus* see *ante*, §§ 132, 184.

Upon the *fourth* proposition of the *syllabus* see *ante*, §§ 245, 246, 247, 248, 249, 250, 251.

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§ 257. ASSENT TO CONDITIONS IN BILL OF LADING — EXEMPTION FROM LOSS BY "FIRE — BURDEN OF PROOF — ACTS OF MOB.

WERTHEIMER v. PENNSYLVANIA RAILROAD COMPANY.

United States Circuit Court, Southern District of New York, January, 1880.

Before Hon. WILLIAM J. WALLACE, District Judge.

1. The acceptance of a bill of lading at the time of the delivery of the goods constitutes a contract between the parties according to the terms and conditions which appear upon its face.
2. Where the contract excepts certain losses, the burden of proving that the loss in question arose from the negligence of the carrier, is upon the shipper.
3. Evidence that the destruction of the goods by fire (an excepted liability) was the act of a mob engaged in a struggle with the authorities of the State, without any proof that the carrier was bound from the circumstances to anticipate such a result, is insufficient to charge him with negligence.

Adolph L. Sanger, for plaintiffs; *Robinson & Scribner*, for defendants.

WALLACE, J.:

On or about July 17th, 1877, the defendants received from plaintiffs at the city of New York for transportation to Pittsburgh, Pa., goods of the value of $1,710. At the time of receiving the goods the defendant delivered to

plaintiffs a bill of lading, whereby it agreed to transport the goods, subject to several conditions, among which was one that the company should not be responsible for loss or damage by fire, unless it could be shown that such damage or loss occurred through the negligence or default of the agents of the company.

On the 17th of July, the car containing the goods was dispatched by defendant from Jersey City for Pittsburgh, reaching Pittsburgh about 1 o'clock A. M., July 20th, at which time a mob took possession of the defendant's property, including the car in question, and held possession until July 22d, when troops ordered by the Governor of the State to aid the sheriff in retaking the property came in conflict with the mob, failed to dispossess the mob, and the mob fired the property and thereby destroyed it.

The delivery of the bill of lading by the defendant, and its acceptance by the plaintiffs at the time of the delivery of the goods, must be deemed to constitute a contract between the parties, with the conditions contained in the bill of lading.[30] These cases all hold that the shipper who accepts the bill of lading can not be heard to allege ignorance of its terms. It is unnecessary to refer to the cases where from the peculiar circumstances attending the acceptance of the receipt assent to its terms was held not to be implied, as the present case is the ordinary one where no peculiar circumstances are shown. Neither are the cases in point which decide that assent on the part of the shipper will not be implied to any conditions which do not appear on the face of the bill of lading. Such was the case in *Ayres v. Western Transportation Company*,[31] which was decided on the authority of *Railroad Company v. Manufacturing Company*.[32]

[30] York Co. v. Central Railroad, 3 Wall. 107 (1865); Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 4 Cent. L. J. 35 (1876); Grace v. Adams, 100 Mass. 505 (1868); McMillan v. Michigan &c. R. Co., 16 Mich. 79 (1867); Hopkins v. Westcott, 6 Blatchf. 64 (1868); Kirkland v. Dinsmore, 62 N. Y. 171 (1875).

[31] 14 Blatchf. 9 (1876).

[32] 16 Wall. 318 (1872).

The effect of the contract made between the parties was to impose upon the plaintiffs the burden of proving that the loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark v. Barnwell*,[33] Mr. Justice NELSON says: "Although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper to show the negligence." In *Transportation Company v. Downer*,[34] the judgment of the court below was reversed because the jury were instructed that it was incumbent upon the defendant [the carrier] to bring itself within the exceptions by showing that it had not been guilty of negligence. Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this court. The plaintiffs have not shown negligence on the part of the defendant, and, therefore, can not recover. But irrespective of any considerations concerning the burden of proof, when it appeared as it did here that the fire by which the plaintiffs' goods were destroyed was the act of a mob engaged in a struggle with the military authorities of the State, without anything to show that the defendants were bound from the circumstances to anticipate such a result, the defense was affirmatively established.

The motion for a new trial is denied.

NOTE.— Upon the *first* proposition of the *syllabus* in the foregoing case, see *ante*, §§ 100, 101, 102, 103, 104, 105, 111, 112, 113, 114, 115, 116.

Upon the *second* proposition of the *syllabus*, see *ante*, §§ 249, 250, 251.

Upon the *third* proposition of the *syllabus*, see *ante*, § 138, *post*, § 258.

[33] 12 How. 272 (1851).

[34] 11 Wall. 129 (1870).

§ 258. STATUS OF CARRIER AFTER SPECIAL CONTRACT—DELAY—DESTRUCTION OF PROPERTY BY MOB—EXEMPTION FROM LOSS "WHILE IN TRANSIT OR DEPOTS."

HALL v. PENNSYLVANIA RAILROAD COMPANY.

United States Circuit Court, Eastern District of Pennsylvania, January, 1880.

Before Hon. WILLIAM MCKENNAN, Circuit Judge.

1. A carrier does not cease to be a common carrier by reason of a contract limiting his liability, but continues subject to all his liabilities as such except for losses arising from causes so excepted which happen without negligence on his part or on the part of his servants and agents.
2. While a common carrier could not excuse a delay by showing that it arose from the acts of a mob, such a delay will not warrant an imputation of negligence showing a cause of loss for which he is expressly relieved from liability by the terms of his contract.
3. A condition in a bill of lading given by a railroad company that the carrier is not to be liable for loss or damage to property by fire or other casualty "while in transit or in depots or places of trans-shipment," *held*, to protect the company from liability where the property was taken from its charge by a mob which it was unable to resist and which two days afterwards destroyed it by fire.

John Fallon, for plaintiff, *Wayne MacVeagh* and *Chapman Biddle*, for defendant.

MCKENNAN, J.:

This suit was brought to recover from the defendant the value of certain wool, delivered to it at Chicago for transportation to Philadelphia. A jury having been waived, the case was tried by the court upon the evidence submitted by the parties. The following facts are found as established by the evidence:

1. The value of the goods in controversy was on the 22d day of July, 1877, at the point of shipment, $18,060.38, and at the point of destination, $20,972.97.

2. The said goods had, in course of transit from their place of shipment to their respective destinations, reached the city of Pittsburgh at least twenty-four hours before the

fire occurred in said city, on July 21st and 22d, 1877, and were then in defendant's custody in the cars in which they had been shipped, and the said cars and the said goods were burned in said fire.

3. The defendant, about July 19, 1877, found itself unable to maintain against the force of a mob, entire possession and control of its own property, and the property in its custody, including that of the plaintiff, and to operate its road. It then called upon the proper authorities, including the sheriff of Allegheny county, for assistance and protection; a requisition was made by said sheriff upon the Governor for the assistance of the military power of the Commonwealth. In pursuance of such requisition, troops were ordered by the Governor to aid said sheriff in re-taking and re-delivering to the defendant entire possession and control of such property, and to enable it to operate its road; and in endeavoring so to do, said troops, on July 21, 1877, came into conflict with said mob and failed to dispossess the same, and immediately after said conflict and failure the property in question was destroyed by fire communicated by said mob.

4. The goods in question were received by the defendant on bills of lading of the form of the annexed receipt, being one of what is usually known as the "Red Star Union Line fast freight" receipts, with all and singular the conditions therein contained. This bill of lading is numbered No. 2856, and is thus identified and exhibited as part of the finding in this case.[35]

[35] The bill of lading contained, amongst others, the following conditions: "That the said Union Line, and the steamboats, railroad companies and forwarding lines with which it connects, and which receive said property, shall not be liable for leakage of oils or any kind of liquids, breakage of any kind of glass, earthen or queensware, carboys of acid, or articles packed in glass, stoves, and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for rust of iron, and of iron articles, or for loss or damage by wet, dirt, fire or loss of weight, or for condition of baling, on hay, hemp or cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable

The foregoing facts are found in pursuance of the written admission of the parties filed in the case. It is further found:

5. If the transit of goods in question had not been interrupted at Pittsburgh, and had been continued in regular course, the train containing them would have been at a considerable distance from Pittsburgh eastward before the time of the occurrence of the fire.

6. When the train containing said goods reached the depot of the defendant in Pittsburgh on July 19, the hands who had conducted it there left it, and a "strike" of all the regular train hands of the defendant occurred on that day, in consequence of a refusal by the defendant to accede to their demand for an increase of wages.

7. On the 19th of July there were standing on the track in the depot yard at Pittsburgh a number of cars laden with petroleum, about one hundred and fifty yards distant from the cars which contained the plaintiff's goods. They were in the same relative position on the day when the fire occurred. The oil cars were kept in place by ordinary brakes. The grade of the road was descending towards the freight cars so that the oil cars would run towards the former by their own gravity. At or before the occurrence of the fire the oil cars were caused to move down the grade until they came in contact with the freight cars, and they were all burned up together.

8. On the 19th, 20th, and 21st of July freight trains continued to be brought into the depot yard of the defendant at Pittsburgh, both from the east and west, in the regular

property of any kind, occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article or property whatever, by fire or other casualty while in transit or while in depots or places of trans-shipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision or the dangers of navigation while on seas, rivers, lakes or canals. All goods or property under this bill of lading, will be subject, at its owner's costs, to necessary cooperage or baling, and is to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the point receipted to, for delivery."

course of transit, and were there stopped so that there was an unusual accumulation of trains at that point.

The court is respectfully requested by plaintiff to find as matters of law:

1. That defendant's duty as common carriers was to carry plaintiff's goods from the several points of shipment to * * Philadelphia, the point of delivery of all, without any unusual or avoidable delay, and apart from the special conditions in the bill of lading, defendant is liable for loss from any cause save the acts of God or a public enemy.

2. That defendant did not cease to be common carriers by reason of the conditions in the bill of lading, but continued subject to all liabilities of common carriers, except for losses happening for causes enumerated in said conditions, without default or negligence on the part of defendant's servants or employees. while defendant was actually discharging its duties of carrying the goods from the point of shipment, in the usual and proper manner.

3. That the interruption of the transit by reason of the refusal of the servants of defendant, in charge of their freight trains on which plaintiff's goods were being carried, to perform their duty, was a default on the part of defendant.

3 1-2 That the strike and refusal to perform duty on the part of the men, does not justify or excuse the interruption of the transit of plaintiff's goods; and that defendant's election not to pay the ten per cent. additional wages demanded, and in lieu thereof to allow the goods to remain at Pittsburgh, wholly or partly in the control of persons who prevented defendant from "operating its road" and performing its contract as common carriers, makes defendant liable for all the consequences, including the destruction and loss of said goods during the period that the transit was thus interrupted, and the plaintiff's property thus wrongfully controlled, without proof of any other negligence or misconduct on part of defendant.

4. That allowing or suffering others than their own employees to take from defendant the possession or control,

whether in whole or in part, of plaintiff's goods, and to use that control not for the purpose of furthering or continuing the transit but for the purpose of suspending and preventing it, was a default on the part of defendant.

5. That however proper it may have been for defendant to call on the public authorities for protection and assistance "in re-taking and delivering to defendant the entire possession and control of said property," such act of propriety in no way justifies the previous default in suffering the possession and control thereof to pass out of their hands.

6. That the various risks enumerated in said conditions, which are assumed by plaintiff in relief of defendant's general liability and more especially the risk "of fire while in transit," are limited to losses occurring while the defendant is engaged in carrying the goods in the proper discharge of its duties under its contract, and do not include loss by fire occurring while the transit is suspended, and the goods in question have been suffered by defendant to pass into the possession and control of persons acting adversely to the duties defendant assumed to discharge.

7. That it was gross default and negligence on the part of defendant to allow freight trains to come into Pittsburgh on the 19th, 20th and 21st of July, under the circumstances in the 7th clause of the facts which the court is requested by plaintiff to find mentioned.

8. That it was gross default and negligence to allow cars loaded with petroleum to continue to stand on the track under all the circumstances and manner and for the period of time in the 8th clause of said facts mentioned.

9. That defendant is responsible for the misconduct and default of the persons whom it suffered to take control and possession wholly or jointly with itself of plaintiff's property, and to continue in such control for the space of two or three days, during the period of time while that control and possession continued and for all loss resulting from such misconduct.

10. On the facts and law aforesaid, plaintiff prays the court to enter judgment for $20,973.97, and interest from July 22d, 1877, to the day judgment is rendered.

Answers by the court to the foregoing propositions of law presented by the plaintiff's counsel:

1. This proposition is affirmed.

2. This is also affirmed.

3. As it was the duty of the defendant, as a common carrier, to transport the goods of the plaintiff to their point of destination without unreasonable delay, any injurious interruption of such transportation by the refusal of the defendant's servants to perform their duty would be a breach of duty imputable to it; and for any loss to the plaintiff caused by such delay the defendant would be liable in damages.

3 1-2. I decline to affirm this proposition. The evidence does not show that the loss complained of was caused by the "strike," nor that any permissive allowance of the retention of the goods at Pittsburgh can be imputed to the defendant. On the contrary, it is admitted by the plaintiff that the defendant was coerced by the superior power of a lawless mob, which usurped control of the train containing the plaintiff's goods and prevented the defendant from operating its road; that the defendant took prompt steps to meet the emergency by an appeal to the civil authorities for protection and assistance; that these authorities with the military force summoned by them were repelled; and that the train with these goods was thereupon destroyed by an incendiary fire. While these circumstances would not protect the defendant against a failure to fulfil its obligation as a common carrier, yet I can not say that an involuntary technical default warrants an imputation of negligence to the defendant touching a cause of loss which is expressly excepted from its liability.

4. The defendant was deprived of the control of the train containing the plaintiff's goods, and was prevented from continuing their transit, by a force it was unable to resist.

It can not be held responsible for the purpose of the mob, although the act of the mob in intercepting the transportation of the goods might subject the defendant to compensation to the plaintiff for any loss sustained by him by reason of such interrupted transit of his goods. I decline, therefore, to affirm this proposition.

5. This proposition is affirmed, with the qualification that I do not say that the defendant was in default, otherwise than as and for the reason stated in the answer to proposition 3 1-2.

6. I decline to affirm this proposition. The exception in the bill of lading is that the carrier shall not be liable "for loss or damage on any article or property whatever, by fire or other casualty while in transit or while in depots or places of trans-shipment." The engagement of the carrier is to assume the custody of the property intrusted to him at the point of shipment, and to deliver it at the place of destination, and the obvious intent as well, I think, as the clear import of the exception is to protect him against the consequences of fire during the continuance of his duty as a carrier. His qualified liability is co-extensive with this duty, and he forfeits its protection only by some fault of his own in connection with the casualty to which the exception refers. Nor can I regard it as within the reason of the exception to hold that it is eliminated from the contract when the property in the carrier's charge is wrested from him by a hostile force which he is unable to resist, and it is consumed in an incendiary fire, although his exclusion from the possession and control of it may last for two days before it is thus destroyed.

7. I decline to affirm this proposition.

8. I decline to affirm this proposition for the reasons that the petroleum cars were presumably in the usual and proper place for them in the depot yard; that they were at a safe distance from the cars containing the plaintiff's goods, and were there secured by mechanical appliances usually employed for that purpose; that they might lawfully be kept

there, and that their removal into contact with the other cars was the act of the incendiary mob which had for two days before maintained a forcible mastery of the situation.

9. I decline to affirm this proposition.

Upon the whole case I am of the opinion, and so find, that the loss complained of was caused by fire while the plaintiff's goods were in transit by the defendant within the meaning of the exception in the bill of lading; that the defendant is not shown to have been guilty of any negligence by which the efficiency of the exception is in any wise impaired; and hence that the plaintiff is not entitled to recover.

Judgment will, therefore, be entered in favor of the defendant.

NOTE.—Upon the *first* proposition of the *syllabus* in the foregoing case, see *ante*, §§ 109, 110.

Upon the *second* and *third* propositions in the *syllabus*, see *ante*, §§ 138, 257.

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§ 259. EXPRESS COMPANY — "FORWARDER" — NEGLIGENCE — CONDITION IN RECEIPT AS TO VALUE OF ARTICLE — DUTY OF SHIPPER.

GALT v. ADAMS EXPRESS COMPANY.

Supreme Court of the District of Columbia, September, 1879.

Hon. DAVID R. CARTTER, Chief Justice.
" ANDREW WYLIE,
" ARTHUR MCARTHUR,
" A. B. HAGNER,
" WALTER S. COX,
" CHARLES P. JAMES,
} Associate Justices.

1. An express company upon receiving three packages for transportation gave the shipper a receipt in which it was stated that the company were "forwarders only:" *Held*, that these words were ineffectual to restrict its liability. The law determines the character of the occupation of expressmen; it assigns to them the liabilities of common carriers, and this *status* is not affected by an agreement between the parties that they are not carriers but "forwarders."

2. The contract of a common carrier which stipulates for exemption from responsibility for the results of his negligence is void as against public policy.
3. The provision in a receipt given by an express company that the latter will not be liable beyond a certain sum if the just and true value of the property be not declared at the time of the shipment, is valid to limit the liability of the carrier as an insurer.
4. But a condition of this character which seeks to cover the negligence of the carrier is void.
5. The omission of one dealing with a common carrier to advise him as to the value of the article presented for carriage, and that its actual is greater than its apparent value, will not affect his rights, unless it justified the carrier in adopting the course of conduct through which the loss occurred.

The facts appear in the opinion.

L. S. Hine and *Reginald Fendall* for plaintiff; *W. B. Webb* for defendants.

JAMES, J., delivered the opinion of the court:

This cause comes here on exceptions to the instructions given to the jury at the trial.

The bill of exceptions shows that plaintiffs produced evidence that in January, 1875, the defendant received from them three packages, two for delivery in New York and one for delivery in Philadelphia; that on receiving them the agent of the express company gave for each package a bill of lading which contained, with a difference only as to the consignees, this clause: "Received from M. W. Galt, Bro. & Co., one box, value asked, not given; for which this company charges ———; marked —, etc.; which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation. It is part of the consideration of this contract, and it is agreed that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots or in transit, leakage, breakage,

or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt; which insurance shall constitute the limit of the liability of the Adams Express Company."

That the three receipts thus signed by the agent of the company were contained in a book furnished by the company to the plaintiffs; that excepting the charge for freight the blanks therein were filled up by plaintiffs' bookkeeper before they were signed; that no question was asked and nothing was said by either party as to the contents or value of the packages; that the express company placed the three packages in a car set apart for its use attached to the train of the Baltimore and Potomac Railroad Company, for transportation to the consignees at New York and Philadelphia; that while on its way to Baltimore this train collided at Benning's Station with another train, whereupon the express company's car with others caught fire from the locomotive and was burned, together with the packages in question and a considerable quantity of valuable goods and a large amount of money; that this collision was caused by the negligence of the switch tenders in the employ of the Baltimore and Potomac Railroad Company at Benning's, who had opened the switch for another train to pass on to the siding and there remain until the night express from Washington should pass, and had failed to change it back; that when the engineer caught sight of the switch-target at Benning's, then only thirty yards distant, the train was running about thirty-five miles an hour, and notwithstanding his best efforts to check its speed, passed on to the siding with such momentum that it telescoped half the train there standing, killing the postal clerk and injuring several other persons; that within five minutes the train was on fire from end to end,

and a large amount of goods in the express company's car was in consequence destroyed.

The plaintiffs further introduced evidence tending to show that of the packages shipped by them, one contained silver-plate, coin, &c., amounting in value to $699.38, another an amethyst ring worth $12, and a third a silver spoon worth $8; that a day or two after the collision, a barrel was exhibited to one of the plaintiffs by the agent of the company, as containing the debris of all the packagss carried in the company's car; that no part of this debris was delivered to the plaintiffs, the agent stating that he was instructed to send it to the central office in New York.

On cross-examination of plaintiffs' witnesses, some question was raised whether the tender of the switch at Benning's was in the employ of the Baltimore and Potomac Railroad or of the Washington City and Point Lookout Railroad; but it was stated that he had previously served at that switch, and that the switch itself belonged to the Baltimore and Potomac Railroad.

On the part of the defendant, evidence was introduced to show that the company's agent sent the whole of the debris to the central office in New York, forwarding also the detailed statement of plaintiffs' goods, and that the general agent in New York took charge of the debris and delivered the silver found in it to one Hart of New Orleans, who claimed to have shipped it. The defendant further offered evidence to show that there was nothing to indicate that plaintiffs' packages were of any special value.

It thus appears by evidence offered by the defendant, and, therefore, by admission, either that the plaintiffs' packages were utterly destroyed at the time of the collision, and failed by that reason to reach their destination, or that the whole or such part of them as were saved and forwarded were delivered to some other party.

Upon this evidence the defendant asked the court to instruct the jury as follows:

1st. "That the execution of the express receipt or bill of lading of the Adams Express Company and its acceptance by the plaintiffs concurrently with the delivery and receipt of the property, constitute a special contract between the parties for the carriage of the goods; and the rights and liabilities of the respective parties are to be governed thereby, and the conditions and exemptions therein set forth are to be binding on each." This instruction was granted with the following proviso: "Provided, that the jury do not find that the loss of the packages was occasioned by the gross negligence of the defendant."

2d. "If the jury believe from the evidence that at the time when the packages in question were delivered by plaintiffs to defendant for carriage, the said defendant or its servants or agents asked of said plaintiffs the value of said packages, and that the said plaintiffs refused to give such value and concealed the same, so that the said defendant as carriers were ignorant of the value thereof; then the said plaintiffs, if entitled to recover at all, can only recover in this action the sum of fifty dollars, with interest from the time of the said loss." This instruction was given with the qualifications attached to the first.

3d. "That it was the duty of the plaintiffs, at the time of the delivery of the packages in question to the Adams Express Company under the terms of the contract, to state the value of said packages, if they desired in case of loss to recover a sum exceeding fifty dollars." This instruction was given with the qualification already stated.

4th. "That irrespective of the terms of the contract requiring the shipper to state the value, or in default of such statement limiting the liabilities of the company to the sum of fifty dollars, it was incumbent upon the plaintiffs to disclose the value in view of the fact that the package contained articles of great value, such as silver, etc." This instruction was also given with the same qualification.

By their verdict for an amount largely exceeding the

limit proposed in the bill of lading, the jury necessarily found that the loss was occasioned by the gross negligence of the defendant.

We do not propose to adopt the mechanical method of considering these instructions and exceptions *seriatim*, since the issues raised by them can better be disposed of by a statement of the general principles on which this court has agreed.

Undoubtedly a written instrument signed only by one party, but accepted and acted upon by the other, may furnish the terms of a mutual contract. Although the accepting party does not become technically a party to the writing, he assents to its terms as the terms of his unwritten agreement, and thus the same terms are agreed upon by both. In this way the plaintiffs and the defendant actually entered into a special contract upon the terms of the bill of lading given by the latter. But it does not follow that all of the terms thus actually agreed upon are lawful. If any of them constitute an agreement which such parties are not permitted by the law to make, they are simply void and do not govern the rights or obligations of those parties.

In applying this principle, we observe in the first place that the receipt before us stipulates that the Adams Express Company are *forwarders* only. But it is to be gathered from the evidence set out in the bill of exceptions and from the verdict that they were found to be actually carriers, using as their instrumentality of transportation the roads and servants and trains of the Baltimore and Potomac Railroad Company. The law determines the character of this business and occupation, and it assigns to the Adams Express company the *status* of common carriers, and we hold that this *status* is not affected by an agreement of parties that they are not carriers but only forwarders.

In the next place the bill of lading provides that the express company "are not to be held liable or responsible for any loss or damages" to the property received by them "from any cause whatever, unless in every case the same

be proved to have occurred from the fraud or gross negligence of said express company or their servants;" and it then undertakes to limit the responsibility of the company by a further condition that even in case of loss or damage by the fraud or gross negligence of the company, the holder of the receipt shall not "demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt." It was insisted in the argument on behalf of the defendant that the legal effect and intendment of this clause is simply to provide in the absence of a special declaration of value for a rule of valuation; and that it is competent for parties, even where the liability arises from gross negligence, to agree upon the fact of value. Authorities were cited which have given this interpretation to the clause in question and have recognized the validity of the agreement as thus interpreted. The first question, then, relates to the proper interpretation of the clause; and we hold that inasmuch as this condition undertakes to provide against liability for loss or damage arising from gross negligence, the legal effect of that part of it which speaks of value is not to ascertain and adjust the value of property, but to limit the damages, the penalty to which the law would have subjected the carrier on account of his fault. By tendering such a condition the carrier substantially says to the shipper. "I am aware that the law would hold me responsible for the actual value of this article, although not disclosed to me, in case it should be lost or destroyed by means of my gross negligence; but I propose to exempt myself from so much of that liability as may exceed fifty dollars, by assuming that the actual damage to you occasioned by my fault is only fifty dollars; and this I propose to do by assuming that the article is worth only fifty dollars." This is not in good faith a valuation of property. Its legal effect, and, therefore, its legal intent, is to restrict the measure of damages recoverable in case of negligence, and thus to exempt the wrong-doer from a part

of his responsibility; and as a matter of interpretation, the meaning of the clause which operates only in this way is not to be changed by giving to it an arbitrary name. It may be added that by its terms the clause in question is to be applied as well in cases of losses by the fraud of the company as in cases of losses by its gross negligence; and that the rule of interpretation must, therefore, be uniform in both cases. It would certainly be a very remarkable interpretation which should hold that this clause only meant in good faith to provide an ascertainment of the value of the property, in case it should be made way with by the fraud of the carrier.

We hold, then, that the intent and operation of this condition is merely to exempt the express company from a part of its obligations as a common carrier, in case the damage done to the shipper by its fault shall exceed the amount of fifty dollars. If we are right in this conclusion, we have next to consider whether a common carrier can stipulate for a partial exemption from his full liability in cases of gross negligence.

We are aware that in some of the States, notably in some which possess or perhaps are possessed by vast railroad corporations, the doctrine of exemption has been carried to extremes; but if this court were disposed to follow such a lead, it is prohibited to do so by the rulings of its superior, the Supreme Court of the United States. In *Railroad Company v. Lockwood*,[36] that court, after the most exhaustive examination of American and English authorities, have laid down the principle by which we must be guided; namely, that a common carrier, whether of goods or passengers, can not stipulate for exemption from responsibility for the negligence of himself or his servants. It is true the question immediately before the court related to the carriage of passengers; but it inevitably involved the discussion and determination of principles of public policy and of law which apply completely to the business of common carriers of

[36] 17 Wall. 357 (1873).

goods, especially of common carriers by railway. We would have held and enforced that doctrine without such superior authority. We now feel disposed as well as bound to apply the principle on which that case turned in all the fullness of its spirit. We hold, then, that the principle of law which for considerations of public welfare forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper's perfect consent can not wholly relieve the carrier, is that the object which he undertakes to regulate by contract is not his own but a public right. Practically every kind of common carrier becomes an agency which the rest of the community are compelled to employ, and with little inquiry as to his peculiar fitness. In other words, he acquires in some degree the position of a monopoly. And if this be a sufficient reason for imposing peculiar duties and exactions upon ordinary common carriers, it applies with incomparably greater force to railroads and to carriers who by employing those roads as instrumentalities of their transportation make those instrumentalities their own. They are universally authorized to appropriate private property on the very ground that such appropriation is for the public use. And if they are understood, in contemplation of law, to be occupied in using and managing property for public welfare, their business of transportation, which is the only use to which they apply the property so appropriated, must be understood to be carried on for the public welfare. Their obligation to exercise not only a reasonable but a very high degree of care in that business, becomes, therefore, a duty to the public, and can neither be put aside nor impaired by the consent of individual members of the community. No single person is allowed to agree that such a carrier, or that any carrier who owes a public duty, may with impunity be negligent in his case, for the reason

that the carrier is thereby invited to omit his duty in other cases, and thus injure the whole community. Can it be possible that these considerations on which the rule against total exemption is based, lose their force when the carrier is invited to violate his public duty by an agreement that he may violate it at half price? The principle of the rule is that any agreement which operates to interfere with the public right touching the care and good faith of common carriers, in an agreement against public policy and welfare, and is, therefore, void; and as an agreement that his negligence shall be cheap must operate in this way, it necessarily falls within that principle.

We are of opinion, therefore, that the court instructed the jury correctly, in allowing them to find for the full value of plaintiff's property, notwithstanding the conditions of the bill of lading, if they should find that the loss was occasioned by the gross negligence of the defendant.

As to the duty of a shipper to advise the carrier that the actual was greater than the apparent value of the article shipped, we hold that his omission to give such information does not affect his rights, unless it justifies the carrier in adopting the course of conduct by which the loss occurred. A carrier who is allowed to suppose that an article may be handled in a particular manner is not responsible for so handling it, and the shipper has to submit to the natural effect of his own omissions to give proper information. But that case is not before us. It can hardly be imagined, that the omission of the plaintiffs to disclose the exceptional value of their shipment tempted the defendant to wreck and burn its train.

NOTE.— Upon the *first* proposition of the *syllabus* in the foregoing case, see *ante*, §§ 1, 109, 233.

Upon the *second* proposition of the *syllabus*, see *ante*, §§ 28, 132.

Upon the *third* proposition of the *syllabus*, see *ante*, § 88.

Upon the *fourth* proposition of the *syllabus*, see *ante*, § 133.

Upon the *fifth* proposition of the *syllabus*, see *ante*, § 134.

§ 260.— EXPRESS COMPANY— LIABILITY FOR LOSSES CAUSED BY NEGLIGENCE OF RAILROAD — CONDITION IN RECEIPT LIMITING LIABILITY — EVIDENCE OF ASSENT.

BANK OF KENTUCKY v. ADAMS EXPRESS COMPANY.

United States Circuit Court, District of Kentucky, July, 1874.

Before Hon. BLAND BALLARD, District Judge.

1. Where a bank, through its teller, gives packages of money to an express company to transport to another city, and in so doing the teller fills out the blanks in the express company's ordinary printed receipt, and gives it to the agent of the company to sign, and the receipt contains a printed stipulation exempting the express company from liability for loss or damage occasioned by fire, it is no objection to the validity of this stipulation that the attention of the officers of the bank was not called to it; and it is not error to instruct the jury in such a case that the bank would be bound by it, whether it was known to them or not.
2. An express company which receives packages of money to carry from one point to another, on a contract exempting it from liability in case of loss or damage by fire, is not liable for the loss of such packages in consequence of a fire resulting from a railroad accident, which happens without fault of the express company or its agents while such packages are being transported to their destination in the custody of the express company's messenger, upon a railroad train, operated and controlled by the agents and servants of the railroad company, and over which neither the express company nor its agents have any control. The railroad company, in such case, does not stand in the relation of agent or servant to the express company.

The plaintiff sued the defendant for damages for the loss of a package of money intrusted to the defendant by the Louisiana Bank at New Orleans, Louisiana, for delivery to the plaintiff at Louisville, Kentucky, but which was lost *en route* in consequence of a railroad accident. Under the instructions of the court, the jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

John M. Harlan and *Barr, Goodloe & Humphrey*, for plaintiff; *I & F. Caldwell* and *G. C. Wharton*, for defendant.

BALLARD, J.:

On a former day there were in this case a verdict and judgment for the defendant. At the trial the counsel for the plaintiff took several exceptions to the rulings of the court and charge to the jury, and they have now moved for a new trial, assigning for cause that the court erred in refusing to give the instructions asked by them and in giving the instructions which were given.

The learned counsel have submitted no argument on their motion. They stand on the argument made and the authorities cited at the trial. As both that argument and those authorities received at the time the fullest consideration, I think I would be justified in overruling the motion without adding to what was then said, but as the opinion then expressed by me on the main point in the case is apparently opposed to several respectable authorities, and is supposed to present a new and important question, I feel that I ought not to allow this opportunity to pass without attempting a vindication of an opinion, the correctness of which has been confirmed by subsequent reflection.

The facts in the case are substantially as follows: The Southern Express Company and the Adams Express Company are engaged each in the business of carrying money and other articles from one part of the country to another, for hire, at the request of any one who offers such articles to them for carriage. They do not use in their business any vehicles of their own except such as are required to transport the articles intrusted to them, to and from railroad depots, and to and from steamboat landings. They use railroads, steamboats and the other public conveyances of the country. These conveyances are not subject to their control, but are governed entirely by the companies and persons to whom they belong. The packages intrusted to them are at all times, while on these public conveyances, in the care of one of their own messengers or agents. These companies are engaged in carrying by the railroads through Louisiana and Mississippi to Humboldt, Tennessee, and

thence over the Louisville and Nashville Railroad to Louisville, Ky., under a contract by which they divide the compensation in proportion to the distance the article is transported by the respective companies. Between Humboldt, Tenn., and Louisville, Ky., both companies employ the same messenger, but this messenger, south of the northern boundary of the State of Tennessee, is subject entirely to the orders of the Southern Express Company, aud north of that boundary is subject entirely to the orders of the Adams Express Company.

These express companies are in the habit of charging one price when they undertake to insure the safe delivery of the articles intrusted to them — that is, when they do not modify their ordinary responsibility as common carriers, and of charging another and lower price when their responsibility is limited. The Louisiana National Bank was aware of these regulations, and had in its possession printed blank receipts or bills of lading, showing in the body the conditions and exceptions upon which the companies would undertake to carry at the lower rate, and in the margin the printed blank for the rate at which they would insure. Having received a letter from the plaintiff directing the forwarding by express of the sum of $13,528.15, the bank, by its teller, filled the blanks in that part of the bill of lading which contained the conditions and exceptions, and presented it to the Southern Express Company for its signature and delivered the package of money addressed to the plaintiff without stating who was the owner. The bill of lading was signed and re-delivered to the teller of the Louisana National Bank, and forwarded by him to the plaintiff at Louisville. It does not appear that the receipt was read at the time of its delivery, or that the attention of the officers of the Louisiana National Bank was called specially to the exceptions contained in it, but, as before stated, the bank was aware of these exceptions and of the stipulations for the lesser rate of compensation.

This package was carried by the Southern Express Com-

pany from New Orleans to Humboldt, Tenn., and there delivered to the joint messenger of the Southern and Adams Express companies. While it was in the custody of this messenger between Humboldt and the northern line of the State of Tennessee, the car in which the package was contained was percipitated through a trustle-work on the line of the Louisville and Nashville Railroad, at or near Budd's creek, and the car and package were destroyed by fire. This was caused by the fallen locomotive, without any fault or neglect on the part of the messenger who had charge of the package.

So much of the receipt as is material to the present controversy is as follows:

"SOUTHERN EXPRESS COMPANY.

"*Express Forwarders.*

"No. 2.—$13,528.15. JULY, 26, 1869.

"Received from the Louisiana National Bank one package, sealed and said to contain $13,528.15, addressed 'Bank of Kentucky, Louisville, Kentucky.'

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there deliver the same to other parties to complete the transaction, such delivery to terminate all liability of this company for such damage; and also that this company are not to be liable in any manner or to any extent for any loss or damage * * * of such package or of its contents * * * occasioned * * * by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person."

Upon these facts the court charged the jury:

First—That the Southern Express Company and the Adams Express Company are common carriers.

Second—That the Adams Express Company is liable for the loss of packages delivered to the joint messenger of the two companies at Humboldt, Tenn., although the loss occur south of the southern boundary of the State of Tennessee.

Third—That if the jury believe the facts above detailed in relation to the execution of the receipt, then it thus signed and delivered constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

Fourth—"If the bill of lading contained no exception it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and, therefore, accountable. But the bill of lading among other exceptions contained this: 'That the company are not to be liable in any manner or to any extent for any loss or damage * * of such package or its contents * * occasioned * * by fire.' Now, if you believe that the package was destroyed by fire as above indicated, without any fault or neglect on behalf of the messenger of the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care or from the negligence of the Louisville and Nashville Railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility is undoubtedly responsible for losses, whether occurring on vehicles controlled by him exclusively or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry; but when he has limited his liability so as to make himself re-

sponsible for ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control. If in his employment he uses the vehicles of others over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper—he shall not be liable for the same unless it arises from his want of care or the want of care of his employees. Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it —that is, give no more effect to it than if it had not been adduced."

The first and second instructions were not excepted to, but the third and fourth were.

At the trial the plaintiff insisted that it was not bound by the terms of the receipt, because it was not shown that the attention of the Louisiana National Bank was called to them at the time or that it expressly assented to them, but I am of opinion that there was no error in this portion of the charge. The Louisiana National Bank was aware that the receipt contained some exceptions and conditions. It accepted the receipt without remonstrance or objection, and both authority and reason demonstrate that the receipt must under these circumstances be regarded as constituting the contract of the parties.[87]

It is now everywhere admitted that a common carrier may limit his responsibility by express contract, and if he may

[87] Dorr v. New Jersey Steam Nav. Co., 4 Sandf. 136 (1850); Wells v. Steam Nav. Co., 8 N. Y. 375 (1853); Grace v. Adams, 100 Mass. 505 (1868); Holford v. Adams, 2 Duer, 471 (1853); York Co. v. Central Railroad, 3 Wall. 107 (1865).

make an express contract with the shipper of goods, I can not see why the contract may not be shown by the same evidence which would establish a contract between other parties. I can not see why a writing delivered by a carrier to an owner of goods, intended by the former to express the terms and conditions of his contract to carry, and received by the latter as such, should not constitute the contract between them.

A common carrier it is true is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has, however, a right to charge in proportion to the risk assumed by him. It is upon this ground the authorities hold that unless his responsibility is modified by express contract his undertaking to carry is upon the terms and conditions which are imposed by law. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge if he undertook to carry only upon all the conditions imposed by law, and has by his receipt delivered to the shipper stipulated for a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

The correctness of the proposition contained in the remaining portion of the charge to which exception was taken may, I think, be demonstrated in two ways:

First. By the contract between the bank and the express company it agreed that the company should not be responsible for any loss or damage of the package which should be occasioned by fire. The loss was occasioned by fire; hence the carrier by the terms of the contract is not responsible. It is not pretended that the contract was violated by using the cars of the Louisville and Nashville Railroad Company to transport the messenger and the package or was violated in any other respect; it follows, therefore, that if the company is liable at all it is not by virtue of the contract but in spite of it.

The contract, however, does not attempt to exempt, nor could it have exempted, the express company from loss occasioned by the neglect of itself or its servants, but when it is sought to charge the company with neglect it must be such neglect as it is responsible for upon the general principles of law.

Now, upon these principles no one is responsible for damage occasioned by neglect, unless it be the neglect of himself or his servants or agents. But the facts stated show that neither the company nor its servant was guilty of any neglect. It follows that the defendant can not be charged on this account. Though the defendant used the Louisiana and Nashville Railroad to transport its messenger and the package, the railroad company was not, in any legal sense, the servant of the defendant. The defendant had no control over the railroad company or over its servants. The railroad company was no more the servant of the defendant than it is of any passenger whom it transports. It was no more the servant of the defendant than is the hack or cab the servant of him who hires it to transport him from one part of the city to another.

Second. All the authorities agree that when a common carrier has by special contract limited his responsibility "he becomes with reference to that particular transaction an ordinary bailee — a private carrier for hire," or "reduces his responsibilities to those of an ordinary bailee for hire." [38] I prefer the latter form of stating the proposition, because it is less misleading. I do not think that a common carrier by entering into a contract limiting his responsibility changes his character. He still remains a common carrier with his responsibility limited in respect to the matter embraced in his contract to that of an ordinary bailee for hire. The authorities are equally clear that an ordinary bailee for hire is bound to only ordinary diligence,

[38] York Co. v. Central Railroad, 3 Wall. 107 (1865); New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. 344 (1848); Railroad Co. v. Lockwood, 17 Wall. 357 (1873).

and responsible only for losses and injuries occasioned by negligence or want of ordinary care. The defendant did by special contract limit its responsibility, and neither it nor its servant, the messenger, is chargeable with any neglect or want of care. The loss of the package was occasioned by fire. The contract provides that the defendant should not be liable for a loss so occasioned, and as neither the defendant nor defendant's servant was wanting in care it follows that it is not responsible for the loss.

Suppose the package had been lawfully intrusted by the Louisiana National Bank to a private person to be carried for hire and delivered to the plaintiff, and it was contemplated by the parties that such person would transport the package and himself by the railroads which it was contemplated the defendant would use, and the package had been lost under the same circumstances that the package delivered to the defendant was lost, would it for a moment be contended that such private person would be responsible?

Suppose again that a person should deliver to his friend, who contemplated coming from New Orleans to Louisville by the ordinary modes of travel, a watch, to be carried and delivered at the latter city, and that while such private carrier without reward was proceeding on his way in one of the cars of the Louisville and Nashville Railroad Company, the car should by gross carelessness of those having charge of it be thrown from the track, and the watch in charge of the carrier, without any neglect on his part, destroyed. Is it conceivable that such carrier would be responsible for the loss? To hold that he would be responsible would not only violate the plainest principles of law but would shock the common sense of mankind, and yet not only the private carrier for hire but the private carrier without reward is responsible for the loss of a package intrusted to him under the circumstances supposed if the defendant is responsible for the loss of the package claimed in this case.

The private carrier for hire is responsible for losses and injuries occasioned by want of ordinary care on his part or

on the part of his servants; and a private carrier without any pay is responsible, if not for want of ordinary care, certainly for gross neglect. It can not be maintained with the least show of reason that the Louisville and Nashville Railroad was any more the servant of the defendant in transporting the package sued for in this case than it is the servant of the carrier for hire and the carrier without hire in the cases supposed, and if these last are not responsible for the neglect of the servants of the railroad company it is impossible to conceive that the defendant is responsible for such neglect.

The counsel for the plaintiff attempt to escape this conclusion by insisting that though the defendant limited its responsibility it still remains a common carrier, and that such carrier is responsible not only for any want of negligence of himself and his servants, but for the negligence of any agency which he may employ in his business.

This proposition is misleading. It is not strictly correct to say that a common carrier is responsible for the negligence of any agency in his business, or even for his own negligence or that of his servants, in the sense in which his responsibility is distinguished from the responsibility of another person. A common carrier is bound to deliver goods intrusted to him unless prevented by the owner, the act of God or the public enemy. He is as the law terms him an insurer for the safe carriage and delivery of goods, subject only to the exceptions above mentioned. If he does not deliver goods intrusted to him he is responsible, not because the goods were lost by his neglect or by the neglect of a servant, or by the neglect of some agency which he employed, but because he insured their delivery. His responsibility is wholly independent of the neglect of any one. If goods delivered to him to be carried are lost while in his or his servants custody, or while in the custody of some other person who is not his servant, he is equally responsible, not because he is liable upon any principle of law for the negligence of any person who is not his servant, but be-

cause he is bound by law to carry and deliver safe all goods delivered to him unless prevented as before stated by the owner, the act of God or the public enemy. If he has limited his responsibility by special contract, and the loss has been occasioned by the cause excepted in the contract, then the owner in order to charge him must show that though the loss arose directly from the cause excepted that cause itself was occasioned by the neglect of the carrier. But when a public or private carrier is sought to be charged with loss occasioned by his neglect, when neglect is the foundation of the plaintiff's claim, I am not aware that he is liable for any negligence except upon the same principles and under the same circumstances that any other person is liable. I am not aware that he more than any one else can be made responsible for the negligence of persons who are not his servants.

Undoubtedly the defendant did, notwithstanding its contract, continue to be a common carrier, but its responsibility was limited to that of an ordinary bailee for hire. Now, an ordinary bailee for hire is responsible for only ordinary care, and liable for the neglect of himself or his own servants, and not for the neglect of persons over whom he has no control. Consequently he is not responsible for a loss occurring under the circumstances presented in this case. If it be admitted that the common carrier has by his contract limited his responsibility to that of an ordinary bailee for hire, then it can not be consistently insisted upon that he shall be held liable as a common carrier who has made no express contract. To admit the contract and to deny any effect to it is too much for one proposition. The proposition of counsel, reduced to its essence, is simply this: That though the defendant has by special contract limited its responsibility to that of a private bailee for hire it is still responsible as a common carrier. A proposition involving so obvious a contradiction can not require further exposure.

But obvious as the fallacy and error contained in the coun-

sel's proposition appear to me, the proposition itself seems to be supported by the decision of the Supreme Court of California in the case of *Hooper v. Wells*;[39] by the Supreme Court of Minnesota in the case of *Christenson v. American Express Company*,[40] and by the learned editor of the American Law Register in his note to the former case.[41]

In the first case the carrier made a contract stipulating that he would not be responsible except as forwarder. The court construed the contract as limiting the responsibility of the carrier to that of a forwarder — that is, of an ordinary bailee for hire—but they held the carrier responsible for a loss occurring on a tug or a lighter which plied between the shore and an ocean steamer, occasioned by the negligence of the managers of the tug, although they were not subject to the control or orders of the express company. In respect to the responsibility of forwarders, the court say: "They are not insurers like carriers, but they are liable for losses of goods while in their custody, resulting from negligence of themselves, and those they employ in their business of forwarders." The correctness of the first part of this proposition can not be disputed, nor do I question the correctness of the latter part, if by "those whom they employ in their business of forwarders," the court mean those who are the forwarders' servants, and subject to their control and orders. The court further say, the responsibility of a forwarder is the same as that of a warehouseman, and "if a warehouseman, instead of using his own warehouse and employing his own subordinates, should for a stipulated sum paid to the owner use in his business the warehouse of another person who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care, occurring while in his possession and resulting from the negligence of such subordinates, although not under his control." If by the words "intrusted to his

[39] 27 Cal. 11 (1864).
[40] 15 Minn. 270 (1870).
[41] Am. Law Reg. Nov. 1865, p. 30.

care," the court mean to suggest a case where the warehouseman has a contract to keep the goods in his own warehouse, I entirely concur in the proposition stated. But if they mean that a warehouseman who violates no contract by removing the goods of his customer from his own warehouse into that of another prudent warehouseman, is responsible for a loss of the goods resulting from the negligence of the subordinate of such other warehouseman, I can not assent to it.

Suppose a warehouseman's warehouse should be destroyed by fire, it would be his duty to remove such of the goods of his customers as were saved to the warehouse of some other prudent person, and it can not be insisted that he would be responsible for the loss of goods occurring there, resulting from the negligence of servants of the latter warehouseman. If a warehouseman contract to keep goods in his own warehouse, and he should remove them — in violation of his contract — to another warehouse, I suppose he would be liable for all losses there occurring, just as a bailee who hires a horse to go to a particular place is responsible for loss or injury to the horse, should he drive or ride him to a different place, and the horse be lost or injured in the prosecution of such other journey.

Again, the court say: "The fact that the defendants made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes, the managers of these various conveyances were their agents and employees." If, as seems to be conceded, it was contemplated by both the plaintiff and defendants that the defendants would not use their own vehicles, but the conveyances of others not at all subject to their control or management, and that in the use of those other conveyances the defendants did not violate their contract, I can not admit that the defendants, who by the admission of the court were only liable as ordinary bailees for

hire, were responsible for loss occasioned by the negligence of the managers of those conveyances. I can not admit that the managers of those other conveyances were in any legal sense their agents and employees. The relation of master and servant, principal and agent, does not and can not exist where the master has no control over the servant and the principal no control over the agent.

The court further say: "The defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves it was their own fault." But I can not see how any argument can be drawn from this to show that the defendants were responsible. Every bailee or depository may hold any one responsible for destroying or injuring goods in his possession, but it can not be maintained that he is responsible for such destruction or injury unless he by his negligence contribute to the same. Besides, the plaintiff had his remedy against the proprietors of those other conveyances which occasioned the loss,[42] and it might be retorted "that if he did not take the proper means to secure himself it was his own fault."

In the Minnesota case, it was stipulated that the carrier "was not to be held liable for any loss or damage, except as forwarders only, or for any loss occasioned by the perils of navigation and transportation." The goods were received at New York, and were to be delivered to Christenson & Brother, Mankato, Minnesota. When the goods reached St. Paul they were placed by the carrier on board the steamboat "Julia," a boat belonging to the Northwestern Union Pacific Company, and managed entirely by its officers and servants, to be transported to Mankato. The goods remained in charge of the carrier's messenger. The boat at the time of the accident was strong and in good condition. The carrier was guilty of no want of care in selecting the "Julia" to transport the goods, but, on the way, the

[42] New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344 (1848)

"Julia" was, through the carelessness of its officers and managers, run against a snag and sunk, whereby the goods were damaged.

The court say that the carrier is not exempt from the loss by reason of the stipulation in its bill of lading that "it is not to be held liable for any loss or damage except as forwarders," because, they say: "In our opinion * * the effect claimed for this clause of the receipt by the defendants is inconsistent with and repugnant to the scope and intent of the result, viewed as a whole, and in connection with the fact showing the defendants' real character and mode of doing business." In other words, the court held that the defendants were common carriers, and that this clause of their receipt did not modify their liability at all. If the court was correct in this, it is indisputable that this clause did not exempt the carrier from responsibility for the loss claimed.

In respect to the other exceptions, "perils of navigation and transportation," the court say: "The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction [of such words] is analogous to that which is put upon the words 'perils of the sea' in bills of lading. While thus it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation, as appears to have been done in Tennessee, if a vessel is wrecked upon one through the negligence of the carrier or of those whom he employs * * * the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to a peril of navigation."

Here again we have the same fallacies and misleading propositions which have been exposed in a former part of this opinion. The sinking of a boat by running on a snag in one of our western rivers is undoubtedly a "peril of navigation." It is none the less a peril of navigation though it occur by the fault of the person navigating the boat. It is wholly misleading to say that it is a peril of navigation

when it results from accident and without fault, and that it is not a peril of navigation when it results from negligence. When goods are lost by reason of such peril, occasioned by the negligence of the carrier, the carrier is responsible, not because the goods are lost by an excepted peril, but because he has brought about the peril through his own carelessness or negligence. He is made responsible for his negligence, not because he is a common carrier, but because he is guilty of negligence and has occasioned loss thereby.

In the books which treat of common carriers, only those carriers are treated of who use their own conveyances; hence it is we often find it stated that the exception "perils of the sea," or "perils of the river," included in the carrier's bill of lading, does not include losses arising from what would be generally understood to be "perils of the sea," when occasioned by the negligence of the servants of the carrier. In such case, the carrier being the owner of the vessel in which the goods are carried, and being responsible for its careful navigation, it is not material in effect whether it is held that a loss arising from an excepted peril brought about by his negligence, is not a peril of navigation within the meaning of the bill of lading, or that the carrier is responsible for a loss occasioned by the negligence of his servants, but it is better and more correct to place the liability in such case on the latter ground, because to place it on the former is misleading.

Certainly, as the court say: "The exception does not excuse the carrier for negligently running into perils, * * * * nor shall he be heard to set up his own negligence to excuse him from responsibility." But in the case before the court, no negligence was imputed to the carrier. He did not attempt to set up his own negligence to excuse himself from responsibility. He set up that by the contract he was not to be liable for losses arising from the perils of navigation, and he showed that the loss did arise from a peril of navigation, without any fault on his part. He was not responsible for the negligence of the managers of

the boat, as I have before shown, because he had no control or authority over them, and as he could be held responsible in the case only for negligence, it would seem he was not liable at all. I think that the court was misled by the definition of "perils of navigation" which is found in the books.

Clearly, that is none the less a "peril of navigation" or a "peril of the sea," because it is attributable to the agency of man. The very case which is generally used to define and explain what is a "peril of the sea," is that of a collision brought about by negligence. If a carrier's vessel should collide at sea with another vessel, through the fault wholly of the latter, it is everywhere admitted that he would not be responsible for a loss arising from such collision, of goods which he was carrying under a bill of lading that exempted him from responsibility for loss arising from "perils of navigation" or "perils of the sea," and yet, undoubtedly, the collision in such case is attributable to the agency—nay, to the negligence—of man.

I have a profound respect for the opinions of the learned courts which I have here noticed, but I think that they are opposed to the general current of authorities—that they are founded on fallacious and misleading propositions, and that they disregard the well-settled principles of law.

The motion for a new trial is overruled.

NOTE.— This case was subsequently reversed by the Supreme Court of the United States, and is inserted here as an illustration of a doctrine now obsolete. See *ante*, Cap. X, § 233.

The following decision construing the Illinois Statute fixing the liability of common carriers receiving property for transportation, has been rendered since the title to this chapter was printed. The statute in question is as follows: "That whenever any property is received by a common carrier to be transported from one place to another within or without this State, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the

same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." R. S. Ill. (1880), Cap. 27, § 1. p. 263.

MATHER v. AMERICAN EXPRESS COMPANY.

United States Circuit Court, Northern District of Illinois, February, 1880.

Before Hon. HENRY W. BLODGETT, District Judge.

The statute of Illinois prohibiting a carrier from limiting his common law liability does not affect his right to restrict his liability to a certain amount where the value of the property received is asked and not given.

BLODGETT J:

This case was tried by the court without a jury, upon an agreed state of facts, the facts being in substance that a package containing two gold watches, and five gold chains, and worth something over $500, was delivered to the agent of the Southern Express Company, at Bethany, Georgia, directed to the plaintiff in this city. The Southern Express Company accepted the package and forwarded it to Cairo in this State, where it was delivered to the American Express Company, who undertook its transportation to this city, the Southern Express Company not running to this point.

No value was marked upon the package. The receipt given to the consignor stated "value asked, but not given." The package was lost after arriving in this city, by theft, by reason of its not having been treated as a valuable package, and placed in the safe where it would have been placed if its true value had been marked upon it.

Suit is brought by the plaintiff, and the question is as to the extent of the recovery to which he is entitled. The defendant admits that it is liable to the amount of $50, there being a provision in the receipt given for this package, that where the value of a package is not stated or disclosed to the company, the liability should be limited to $50. The plaintiff insists that the case comes within the provisions of the act of 1872, of the Legislature of Illinois, which prohibits any common carrier from limiting its liability. I do not think, in the first place, that this case comes within this provision, because this was a contract of carriage made in the State of Georgia, and the parties could make any contract which the laws of the State of Georgia permitted them to make, and the laws of that State allowed a carrier to limit his liability. Wallace v. Matthews, 39 Ga. 617 (1869).

But waiving the question as to whether this contract is to be construed by the laws of Georgia or Illinois.

I do not think that the statute of Illinois intended that a common carrier should be prevented from limiting its liability where it asked for the value of the commodity of which it undertook the transportation, and the information requested is withheld. It seems to me that is one of those

reasonable precautions which a common carrier has a right to demand; and where a sealed or closed package is presented, and the value is asked and the consignor refuses to disclose it, the carrier has a right, it seems to me, to limit its liability to a fixed sum, and say it will undertake the transportation on the assumption that it is not worth over a certain sum. It seems to me competent for a common carrier, under the Illinois statute, to require a shipper of goods to state the value which he puts upon them, and to stipulate that in case of loss the liability of the carrier shall not exceed the amount so fixed; and if this can be done, I can see no good reason why the carrier may not say that when the shipper refuses to disclose the value, the liability of the carrier should not exceed a certain amount. This is equivalent to a special agreement between the parties that for the purposes of the contract of carriage, the value of the goods is fixed at $50. The facts in this case show that the sender of the package was in the habit of shipping packages by the Southern Express Company, and this clause restricting liability to $50 where the value was not disclosed, was in all their receipts given for packages taken for shipment, and must have been known to him. The contract which was given to him by the agent stated that the value was asked but not given.

It is true that the package was marked "watches," but the values of watches vary so widely that no presumption that the value of the shipment exceeded $50 is raised by the statement of its contents. I must, therefore, assume that the consignor was content to accept the sum of $50, as the equivalent of the contents of this package if it was lost in transit. True, the proof shows it to have been worth more than that, but it also shows that the charges of the carrier were regulated by the values and that there was a difference in the care taken of packages when the value was stated and those on which no value was stated; and it seems to me so reasonable that a carrier should be entitled to know the value of property which it undertakes to transport, that I can not believe the Legislature of Illinois intended to prohibit the limitation of liability made by this contract when the consignor refused to disclose the value.

The issue is found for the plaintiff, and damages assessed at $50, and plaintiff must recover costs, as this suit originated in the State court and was removed to this court by defendant.

261. PASSENGERS' TICKETS—CONDITIONS PRINTED THEREIN—NOTICE.

BURKE v. SOUTHEASTERN R. Co.

English High Court of Justice, Common Pleas Division, November, 1879.

Right Hon. LORD COLERIDGE, Lord Chief Justice.
Sir WILLIAM ROBERT GROVE, Knt.,
Hon. GEORGE DENMAN,
Sir NATHANIEL LINDLEY, Knt.,
" HENRY C. LOPES, Knt., } Judges.

Where a ticket, issued by a railroad company in England for a journey from London to Paris, was in the form of a small book of coupons, enclosed in a paper cover, and the paper cover contained printed matter: *Held*, that the contract was contained in the whole book including the cover, and that the English company were protected by a condition printed on the inside or page two of the cover, and exempting them from liability for damage incurred on the French railroad, although the passenger had not read or noticed the condition.

Motion for judgment.

The action was tried in January, 1879, before COCKBURN, C. J., and a special jury, and was brought by the plaintiff against the defendants to recover damages for personal injuries sustained in a railway accident on the Great Northern Railway of France, while the plaintiff was returning from Paris by virtue of a return ticket issued to him by the defendants.

The ticket issued to the plaintiff was not an ordinary railway ticket, but was a little book of a dozen pages containing, within a paper cover, coupons to be torn out and given up at the usual stages of the journey. On the outside of the cover was printed "No. 7,351, Southeastern Railway. Cheap return ticket. London to Paris and back. Second class. Available by night service only. This ticket is available for fourteen days, including the day of issue and expiry. * * * Available for the return journey by the Southeastern, or London, Chatham, and Dover Railways." On the inside of the cover, that is, on page two, the following among

other statements, were printed: — "The cover without the coupons, or the coupons without the cover, are of no value. * * * Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies, such through booking being only for the convenience of passengers." At the trial the plaintiff swore that his attention was not drawn to the above condition. The defendants did not dispute the truth of this statement, but relied on the condition.

In summing up, the learned chief justice said to the jury: "They (the defendants) have a perfect right to make that condition with the passenger, and to stipulate that they shall not be responsible for the negligence of the other company, but they must take care that they bring that condition home to the knowledge of the passenger; or, at all events, that they do what in the opinion of the jury is reasonably sufficient to give him that knowledge. * * * There is nothing to direct the attention to the inside. You may happen to open it and see some printed matter there. Ought you to assume that that printed matter is a condition that you ought to make yourself master before you walk off with your ticket after paying your money? That is the question for you, and you will say whether what is done here is reasonably sufficient on the part of the company to bring to the knowledge of the person taking the ticket that there are some conditions there affecting his ordinary right as a passenger, which it would be incumbent upon the company to take care to bring to his notice." The jury found that there was not sufficient notice given by the company, and a verdict was thereupon directed for the plaintiff for the agreed sum, leaving him to move to enter judgment.

McIntyre, Q. C., and *Barnard*, for the plaintiff, now moved accordingly, and contended that *Henderson v. Stevenson*, controlled the case.[43]

[43] L. R. 2 Sc. & Div. 470 (1875).

Sir *H. S. Gifford*, Solicitor-General, and *Bremner*, for the defendants.

Lord COLERIDGE, C. J.:

This is an action brought by the plaintiff against the Southeastern Railway Company to recover damages for personal injuries which happened to him in France whilst being carried by a French railway company under a through ticket issued by the defendants. We have before us a copy of the ticket which the defendants issued, and it appears that it was in the following form. [The learned judge then read the printed matter which appeared upon the outside of the ticket.] There that page ends. Then on the first page inside are a number of terms relating to various parts of the contract, a good deal of it referring to luggage, amongst other conditions a condition that the English company are not to be responsible for injuries to luggage, and then comes the condition upon which the defendants now rely: "Each company incurs no responsibility of any kind, beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies." Now that is the condition or term upon which the defendants rely, and they say that this injury having happened in France they are not responsible for it. That *prima facie* would be a good answer to the action; but the plaintiff, relying on the decisions of this and other courts, took the opinion of the jury on one question, which was, whether the defendants had given the plaintiff proper notice of this condition, and the jury answered that question in the negative. They may be taken for the purposes of my decision to have found, taking it in the strongest way against the defendants, that the plaintiff did not read the condition, though I think no affirmative evidence was given of the fact. I will assume, however, that the plaintiff neither read that condition nor knew of its existence, whether I think that is a probable or an improbable supposition. Then comes the question, does that afford any answer to the defendant's plea?

In my opinion it affords none. The contract, as I understand it, is simply this little book or ticket, and the whole of this little book. This is the contract, and the terms contained in it are the terms upon which the defendants agreed to take the plaintiff to Paris and back; and in an ordinary case that would be a matter beyond dispute. But it is supposed that with reference to this peculiar subject-matter, with reference, that is, to disputes between passengers and railway companies, some distinction has been introduced by decisions of the highest tribunals. Now, it is of course obvious that *Henderson v. Stevenson*,[44] decided in the House of Lords, binds this court, and that we must obey it, and an attempt has been made to assimilate this case to the case of *Heuderson v. Stevenson*. In that case the facts were that there was a contract to take a passenger from Dublin to Whitehaven, and a condition which it was sought to append to that contract was printed on the other side of the ticket limiting the responsibility of the company. On the same side of the card as that on which "Dublin to Whitehaven" was printed there was no reference at all to the other side, and it was said that the one side only formed the contract, because there was no reference whatever to the other side upon it; and the jury found that the plaintiff assumed—and had a right to assume—that the one side of the card contained the whole of the contract. That was a case of luggage; so that taking the one side of the ticket as the whole of the contract, there would arise upon it the ordinary common law contract; and the House of Lords held that there was no evidence of any other contract beyond the common law contract. It is not for me to express any opinion as to whether the jury came to a right conclusion upon the facts. We have only to look at the law laid down by the House of Lords upon those facts. If in such a case as this the House of Lords had come to the conclusion that in a piece of paper like this the whole of the contract was limited to the first side of the first page out of these

[44] L. R. 2 Sc. & Div. 470 (1875).

ten or twelve pages, I agree that *Henderson v. Stevenson* would be in point and would be binding upon us. But it appears to me that the facts of this case are entirely different, and that the very broadest distinction can be drawn between the two. This ticket is simply a book which contains a great many pages, and it is not disputed that the whole of the leaves of this little book are during the execution of the contract to be made use of. The passenger can not turn the very first page, and make use of the very first coupon, without having under his eye the terms on which the company now rely. It is not a case in which the first side of the first sheet could contain the whole of the contract, because it is admitted that all the coupons, at any rate, form part of the contract. If page one, and also pages three to eleven, form part of the contract, on what ground is page two to be rejected? The company say that this is the contract which they have issued, and which the passenger has accepted. Fraud is not suggested, and this is part of the printed terms which, by the ordinary use of his eyesight, the plaintiff might have seen—not concealed from him at all, nor is there anything to show that it was not in the contemplation of the parties when the contract was entered into. I am of opinion, therefore, accepting *bona fide* the direction of the House of Lords in *Henderson v. Stevenson*, where the facts are similar, that this case is not within the authority of that decision. I decide it accordingly, without casting the shadow of a doubt on the authority of that case. What we are virtually asked to do is to decide in favor of the plaintiff because on the first page of the ticket-book there is not printed in large letters, "Read the next page." That really is what the argument on behalf of the plaintiff amounts to. Judgment must be entered for the defendants.

LINDLEY, J.:

I am of the same opinion. The question is, what contract was entered into? The plaintiff paid his money for a journey to Paris and back, and received a book of tickets,

which was the agreement between the parties, but the finding of the jury does not show what the contract was. The jury found that the plaintiff had not sufficient notice of this condition. That leaves open the question what was the contract. Can the plaintiff make out a contract without that condition? I think not. If the jury had found that the contract was what was printed on the cover, or on some one page of the book of coupons, that would, I think, have been so manifestly against the weight of evidence that the verdict could not have stood. The only answer to the question what is the contract, is: "Here, in this little book, is the contract." We are pressed to apply *Henderson v. Stevenson* to this case, but the facts are not the same. The House of Lords split the ticket in two as it were, by holding that one side contained the contract entered into by the parties, and that the condition printed on the reverse side, but unreferred to on the contract side, was no part of the contract. The ticket in this case is of a different kind, and we can not deal with it as the ticket in *Henderson v. Stevenson*, because we can not say that the first page of the book contains the whole contract, and reject the remaining pages. The physical form of the book does not admit of this treatment. The defendants are entitled to our judgment.

Judgment for the defendants.

NOTE. — See *ante*, Cap. IV. § 106. The distinction made between this case and the authority cited in the judgment is very fine, and quite deserves the following criticism which the case received in a late number of the *Law Journal*: "A judge of a court of first instance, who declares his '*bona fide* acceptance' of a decision of the highest tribunal, and protests that he does not intend to cast 'the shadow of a doubt' upon its authority, generally proceeds to do with it that which Lord Justice Bramwell once declared to be never very difficult to a legal mind — to distinguish it. An illustration of this phenomenon may be found in the judgment of Lord Coleridge and Mr. Justice Lindley in Burke v. Southeastern Railway Company, the binding authority to which the distinguishing process had to be applied, being the well-known decision of the House of Lords in Henderson v. Stevenson with regard to conditions indorsed on railway tickets. In Burke v. Southeastern Railway Company the plaintiff had taken a return ticket from Charing Cross Station to Paris

and back, part of which journey had, of course, to be performed over a French line of railway. Most people know that these tickets are made up in the form of little books, containing, besides a variety of printed matter, six coupons, which the passenger is required to detach and deliver up at the various stages of his composite journey. On the outside of the plaintiff's ticket-book was printed the name of the defendant company, the words 'London to Paris and back,' and a notice as to the time for which the ticket would be available. Inside, on the first page, at the end of a somewhat lengthy paragraph relating to luggage, was to be found a condition declaring that the company would not be liable for any mischance or negligence, except on their own line of railway. With this ticket the light-hearted excursionist — relying, as may be assumed for the purposes of argument *in banco*, on the decision in Henderson v. Stevenson — proceeded on his journey; and though it might have been supposed that the tedium of a second-class railway carriage would have induced him to make the most of his resources, it appeared that the little book, with which the forethought of the company had provided him, remained unread in his waistcoat pocket. It was not to be expected that he would read it in Paris; and, on his way back, two or three French trains ran into each other at a station named Noyelles, and his attention was called to its contents, as he swore, for the first time. Having, of course, no contract with the French railway company, he sued the South-eastern Company for damages for the personal injuries thus sustained; and was met with the condition relieving them from liability, which has been referred to. Now, in Henderson v. Stevenson, the plaintiff had received a ticket, in the ordinary cardboard form, from a steam-packet company, on the back of which was a notice that the company were not to be liable for losses of any kind or from any cause. The plaintiff lost his luggage through the negligence of the company's servants; and the House of Lords held that, inasmuch as the ticket bore on its face only the name of the company and the words 'Dublin to Whitehaven,' with nothing to direct the plaintiff's attention to what was written on the back, the condition on which the defendants relied formed no part of the contract. In Burke v. Southeastern Railway Company, the jury found, in answer to the Lord Chief Justice's question, that the defendant company had not done all that they were reasonably bound to do to give the plaintiff notice of the condition on which they relied. It will be seen, therefore, that the task undertaken by the Common Pleas Division in the latter case — of deferring to and yet distinguishing the decision of the House of Lords in Henderson v. Stevenson — was one of considerable delicacy. The difficulty was overcome, as we understand the decision, in the following way. In Henderson v. Stevenson, there was what purported to be a complete contract upon the face of the ticket. In the case under discussion the whole of the ticket-book, and not merely its outside cover, formed the contract between the parties; a conclusion of fact which was shown, *inter alia*, by the fact that the coupons for the various stages of the plaintiff's journey were bound up in the little book with the conditions by which it was desired to bind him. Though it may ap-

pear presumption to attempt to criticise the judgment of the eminent judges who sat, we find a difficulty in following the process of reasoning by which it was arrived at. It is not easy to see why the announcement 'A. to B.,' with the name of the issuing company, should — on the back of a cardboard ticket — purport to be a complete contract, and put the passenger upon no further inquiry, whilst substantially the same printed matter upon the outside of a paper book is to be taken as referring him to all that is inside it. Unless such a paper book is signed by the passenger accepting it, it is, of course, nothing more than evidence of the oral contract which he must be taken as having made with the issuing clerk; and the argument drawn from the situation of the coupons inside the binding appears to us to have but little weight. If the ticket had been in the form of a pocket-book or pouch, with ivory counters instead of coupons — a perfectly conceivable hypothesis — could it have been contended that the passenger was bound by any printed matter which the company chose to put upon the lining? There is a plain distinction between a written contract and a voucher given by one of two parties to the other as a means of satisfying the servants of the first that he has entered into some contract. If the voucher is signed, or otherwise expressly assented to by the person accepting it, it in effect becomes the contract, but not otherwise; and we cannot help thinking that the next time a question of this nature arises at *Nisi Prius*, the presiding judge, if he desires not to cast 'a shadow of a doubt' upon either Henderson v. Stevenson or Burke v. Southeastern Railway Company, will have a delicate task to perform."

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